EOD 8-14

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PINNACLE CORPORATION, a Delaware corporation

Plaintiff,

vs.

ANGLO AMERICAN EQUITY CORPORATION, an Oklahoma corporation, KAY-CREEK ASSOCIATES LIMITED PARTNERSHIP, an Oklahoma Limited Partnership, et al.,

Defendants.

92-C-28-B

Case No. 92-C-28-B

FILED

AUG 13 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes on for consideration of Defendants' Motion to Dismiss. Defendants ask that the Court dismiss the present case due to a concurrent action in state court. The Court denies Defendants' motion, and stays further proceedings in this matter pending the outcome of the state litigation.

Defendants argue that continuing the present matter results in a "multiplicity of actions" and unduly interferes with the state court. Plaintiff counters that the state action is not parallel to the federal one, and that dismissal results in the Court's failure to properly meet its obligation to exercise jurisdiction. Plaintiff further claims that, even if the issues are parallel, dismissal is inappropriate and the present case should be stayed pending the state proceedings.

Plaintiff cites Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) in support of its proposition that the Court is obliged to consider this matter. In Colorado River, the Supreme Court addressed considerations which could except a district court from exercising jurisdiction

concurrently with a state court. These factors included: inconvenience of the federal forum, avoidance of piecemeal litigation, the order in which jurisdiction was obtained in the two forums, and judicial economy. 424 U.S. at 817-18. The Supreme Court further warned that "only the clearest of justifications will warrant dismissal." 424 U.S. at 819.

The order in which jurisdiction was obtained, judicial economy, and the possibility of piecemeal litigation are factors which tend to support Defendants' present motion. It is quite possible that the state court litigation will have collateral estoppel or res judicata effects on the present matter, particularly with regard to Defendants Kay-Creek Associates Limited Partnership and Anglo American Equity Corporation. The warranty claim in Pinnacle's First Claim For Relief (Complaint, p. 2) is substantially similar to its Cross-Claim in the state court action (Answer, ¶¶ 14-16). The state court has already considered and denied motions to dismiss and motions for summary judgment, and discovery is complete in the state court action. (Affidavit in Support of Motion to Dismiss, p. 3). Exercising jurisdiction now will disrupt these efforts already expended in the state court.

Plaintiff objects that the issues here are different from those in the state court proceeding. This is plainly incorrect. Although the second and third claims in the Complaint ask for different relief than in the state court, all three claims in the present action require the Court to rule on the warranty issue. The issues in the two actions are therefore similar. Plaintiff also notes that the parties in this action are different than in the state court proceeding. While this is true, the warranty

issue being litigated on the cross-claim in the state court concerns the same parties that it concerns here. The Court would be more sympathetic to this argument were it made on behalf of Defendants; as it stands, the only prejudice from a stay here would be against these new Defendants, who propose that the state court proceedings control the present case.

The Court is satisfied that the parallel state court litigation will adequately resolve the issues in this matter. See Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 28 (1983). Plaintiff is correct in noting, however, that dismissal is a harsh remedy in the present case. Since the relief asked from this forum differs from that requested in the state court, and since the parties differ in the two actions, the Court finds that a stay is appropriate. This approach correctly balances the Court's "virtually unflagging obligation" to exercise jurisdiction and those factors which militate against its assertion. Colorado River, 424 U.S. at 817-18.

Therefore, Defendants' Motion to Dismiss is DENIED, and this matter is stayed pending the outcome of the state court proceedings. The parties are to advise the Court of the disposition of the action in the state court.

IT IS SO ORDERED this 12th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARK EDWARD BROWN,

Plaintiff,

vs.

STANLEY GLANZ, *et al.*,

Defendants.

Case No. 91-C-548-E

JUDGMENT

Pursuant to the Order filed herein on June 15, 1992, Judgment is hereby granted to the Defendant Stanley Glanz against the Plaintiff. All parties shall bear their own expenses.

It is so ordered on this 13th day of August, 1992.

S/ JAMES O. ELLISON

JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALLEN MCKINNEY

Plaintiff,

VS.

THE CITY OF TULSA, OKLAHOMA and TODD EVANS, C.W. JORDAN, ROBERT CURRY and D. DELSO, individuals, officers of the Tulsa, Oklahoma, Police Department,

Defendants.

CASE NO. 91-C-288-B

ORDER

This matter comes on for consideration of the Report and Recommendation (Report) of the Magistrate Judge entered herein on August 5, 1992. The Report, in relevant part, related to Defendant Todd Evans' Motion to Dismiss[1], Defendants'[2] Motion for Summary Judgment and the Motion of Plaintiff, Allen McKinney, to Amend Complaint.[3] Also for consideration is the Motion for Summary

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[1] The Magistrate Judge deemed this motion moot because Defendant Evans was joined in the Defendants' Motion for Summary Judgment by court order filed March 6, 1992.

[2] "Defendants" include all defendants except C.W. Jordan, added as a party May 15, 1992, in Plaintiff's Second Amended Complaint, after Defendants' Motion for Summary Judgment was filed.

[3] Plaintiff's Motion for Leave to file Amended Complaint was orally granted at an evidentiary hearing held before the Magistrate Judge on May 11, 1992. Plaintiff's Second Amended Complaint was filed May 15, 1992, essentially adding as a defendant, Tulsa Police officer C.W. Jordan, the supervising officer of the incident in issue.

Judgment filed by Defendant C.W. Jordan on August 6, 1992.

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 and the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. Plaintiff Allen McKinney (McKinney) alleges that on May 4, 1989, he was driving his car with a tag stating "Disabled American Veteran" displayed thereon and was stopped by Tulsa police on a roadside in Tulsa County. McKinney alleges that one officer broke his windshield and other officers pulled him from the car whereupon Tulsa police officers, Defendants D. Delso, C.W. Jordan, Todd Evans, and Robert Curry, gathered and beat him without justification or provocation. McKinney claims the alleged excessive force violated his Fourth and Fifth Amendment rights. McKinney also claims he was later denied his blood pressure and other medications in violation of his Fifth and Fourteenth Amendment rights. McKinney claims he is a disabled American veteran, age 54, suffering from rheumatoid arthritis and a total hip replacement.

Defendants have answered the allegations, denying any use of excessive force and allege that on the date in issue McKinney was seen by officer Delso driving in an erratic manner; that when Delso attempted to stop McKinney the latter eluded Delso and a chase ensued during which McKinney ran a roadblock set up by the police officers; that McKinney was eventually forced to stop his vehicle when the officers boxed his car in; and that McKinney refused to get out of his vehicle in spite of repeated demands to do so, thus requiring the officers to break the windshield to effect arrest. Defendants further allege McKinney was arrested and charged with

driving under the influence of alcohol[4], eluding and resisting arrest, driving while his license was suspended, and a felony charge of running a roadblock. McKinney was later found guilty of all but one of the misdemeanor charges on July 13, 1990, as part of a plea bargain arrangement, the resisting arrest charge being dismissed. On May 14, 1990, he pled guilty to the felony charge of running a roadblock.

In his Report the Magistrate Judge recommended the City of Tulsa's Motion for Summary Judgment be granted. The Report further recommended the Motions for Summary Judgment relating to the individual officers be denied because of the existence of fact questions as to whether the officers violated clearly established law in the situation and whether their actions were objectively legally reasonable. The Court concludes such recommendations are well taken.

In the Report the parties were granted until August 11, 1992, to filed any objection to the Report and Recommendation. None was filed.

The Court concludes the Report and Recommendation of the Magistrate Judge should be and the same is adopted and affirmed. The City of Tulsa's Motion for Summary Judgment should be and the same is herewith GRANTED. The individual Defendants' Motion for Summary Judgment should be and the same is herewith DENIED. Defendant C.W. Jordan's Motion for Summary Judgment should be and

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[4] The Magistrate Judge's Report noted that McKinney "was found to have a blood alcohol content of .202, twice the legal limit."

the same is herewith DENIED.[5]

IT IS SO ORDERED this 17 day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[5] The Court concludes a factual issue exists as to officer C.W. Jordan's involvement or lack thereof in the physical handling of McKinney during the arrest and immediately thereafter.

DATE AUG 14 1992

FILED

AUG 13 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FIRST FINANCIAL INSURANCE COMPANY,

Plaintiff,

v.

MAXIMILIANO, INC., d/b/a EVE'S PLACE; HARRY BROTTON; EVE LUCERO; and TIM LEBLANC,

Defendants.

91-C-867-B

JUDGMENT

This action came on for hearing before the court, Honorable John Leo Wagner, United States Magistrate Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

Judgment is hereby entered in favor of Plaintiff, First Financial Insurance Company, and against Defendants, Maximiliano, Inc., d/b/a Eve's Place, Harry Brotton, Eve Lucero, and Tim Leblanc, consistent with the court's Order filed August 5, 1992, declaring that plaintiff has no obligation under the insurance policy in question for the claims brought in the case of Leblanc v. Brotton et al., Case No. C-91-83, McIntosh County, Oklahoma.

Dated this 12th day of August, 1992.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANK TAUCHER and MARKET MOVEMENTS, Inc.,

Plaintiffs,

vs.

ALEXANDER ELDER, FINANCIAL TRADING SEMINARS, Inc., and OSTER COMMUNICATIONS, Inc.,

Defendants.

Case No. 92-C-98-B

O R D E R

Before the Court is a Motion to Dismiss filed on behalf of Defendants Oster Communications ("Oster"), Alexander Elder ("Elder") and Financial Trading Seminars, Inc. ("FTS"), for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6).

Plaintiff Taucher authors The $upertrader's Almanac ("Almanac"), a nationwide trading information book published by Plaintiff Market Movements, Inc. ("Market"). Defendant Elder, director of Defendant FTS, wrote an unfavorable review of the Almanac that appeared in the June 1991 issue of Futures, a magazine published by Defendant Oster.

The entire review, preceded by a listing of the Almanac's name, author, publisher, description of size and price, and followed by Defendant Taucher's name as author of the review, stated:

> Each year, this almanac grows thicker in volume and thinner in value. The 1991 edition

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is a far cry from early editions.

The amount of futures trading information is limited. Having packed previous issues with trading tidbits, the author seems to be scraping the bottom of the barrel.

Do traders need to pay $129 for quotes from "experts" such as Confucius, Sylvia Porter and Dr. Seuss? The pages are peppered with careless typographical errors.

The author lists countless seasonal and cyclical trades, adhering to an old rule: If you make forecasts for a living, make a lot of them. He offers free copies to traders who write how the almanac helped them -- a cheap gimmick to sell an expensive product.

Taucher and Market allege that the following statements from the review are false and libelous per se: (a) that the book is "thinner in value"; (b) that the 1991 edition is "a far cry from earlier editions"; (c) that the amount of futures trading information is limited; (d) that "the author seems to be scraping the bottom of the barrel"; (e) the allegation that Confucius, Sylvia Porter and Dr. Seuss are trading experts; (f) that the pages "are peppered with careless typographical errors"; (g) that the trades referenced in the book are "countless" and that such information is "a cheap gimmick to sell an expensive product".

In addition to the libel complaint, Taucher alleges intentional infliction of emotional distress and tortious interference with business relations, and Market alleges tortious interference with business relations, based upon the book review.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted, it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim that

would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), cert. denied, 397 U.S. 1074 (1970).

Libel is defined under Oklahoma law as:

> [A] false or malicious unprivileged publication by writing, printing, picture, or effigy ... which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation ....

12 O.S. §1441.

The Oklahoma Supreme Court has held that statements alleged to be defamatory fall into three categories: (1) Those not of defamatory meaning; (2) Those reasonably susceptible of both a defamatory and innocent meaning (commonly called libel per quod); and (3) Those clearly defamatory on their face (commonly called libel per se). Miskovsky v. Tulsa Tribune Co., 678 P.2d 242, 247 (Okla. 1983), cert. denied, 465 U.S. 1006 (1984); Kleier Advertising, Inc. v. Premier Pontiac, Inc., 921 F.2d 1036, 1044 (10th Cir. 1990).

In this Complaint, Plaintiffs allege that Defendants' book review is libelous per se. The Court must examine the *entire article* to determine whether it is libelous per se: "Language out of context may have a different meaning than the same language within the four

corners of the [document]," Miskovsky, 678 P.2d at 247, citing Winters v. Morgan, 576 P.2d 1152, 1154 (Okla. 1978). Libel per se will not be found unless by fair construction, the article imputes to the plaintiff "fraud, deceit, dishonesty or reprehensible conduct in its business." Royer v. Stoody Co., 192 F.Supp. 949, 973. (W.D.Okl. 1961).

In Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695 (1990), the Supreme Court refused to carve out a special exception under the First Amendment for items labeled "opinion", stating that established judicial procedures were sufficient to determine libel in all cases, regardless whether a published item was considered fact or opinion. The Supreme Court held that its precedent cases "provide protection for statements that cannot 'reasonably be interpreted as stating actual facts' about an individual ... This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." Id. at 2706, citing Hustler Magazine, Inc., v. Falwell, 485 U.S. 46, 50 (1988).

Oklahoma law is in line with Milkovich. "If statements are shown to be merely statements of opinion, and not statements of fact, such statements are incapable of being false; statements of opinion are not actionable if a reasonable reader of the statements would not have interpreted the words as imputing a criminal act." Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587 (1982).

Taking all of Plaintiffs' allegations as true, the Court

concludes that they have not stated a claim. A book review, which is "merely statements of opinion and not statements of fact", is not actionable under Miskovsky or Milkovich. Looking at the entire piece and not just at Plaintiff's excerpts, as Oklahoma libel law compels the Court to do, the book review does not allege facts that are capable of being proven as false. Therefore, under Milkovich, there cannot be liability under state defamation law. Nor does the piece "impute a criminal act", which is required for libel per se according to Miskovsky.

The Oklahoma Court of Appeals, in Tanner v. Western Publishing Co., 682 P.2d 239 (Okl.App. 1984), sustained a demurrer in a libel action involving an advertisement. The court held that characterizing the plaintiff as egotistical is a judgmental, rather than factual, statement that "cannot form the basis of a libel action, as [such adjectives] cannot be verified as true or false." Tanner, 682 P.2d at 241, citing Miskovsky, 654 P.2d at 594. The court also was concerned with the chilling effect such liability would have on the expression of opinion.

While Plaintiffs' only allege libel per se, in their response to Defendants' Motion to Dismiss, Plaintiffs state that "implied within plaintiffs' allegations for libel per se is libel per quod." The Court concludes that Plaintiffs' Complaint cannot be considered libel per quod instead of libel per se. Special damages are required when stating a claim for libel per quod, and none was stated here. Miskovsky, 678 P.2d at 248. Continental Casualty Co. v. Southwestern Bell Telephone Co., 860 F.2d 970, 976 (10th Cir.

1988), cert. denied, 489 U.S. 1079 (1989).

Plaintiff Taucher also alleges intentional infliction of emotional distress. In Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978), the court, citing the Restatement (Second) of Torts view, stated that "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." The court continued, "If the law allowed liability based upon mere insults or indignities, there would be great danger of frivolous claims." Id. at 1376.

Plaintiff has made no allegations supporting this claim beyond the statement that "Plaintiff Taucher seeks damages in his favor and against all the defendants on the theor[y] of relief of ... intentional infliction of emotional injury ..." He has not alleged extreme behavior on the party of Defendants, and he has not alleged emotional distress on the part of Plaintiff Taucher. The statement that the review remarks "have caused the plaintiffs damage personally" does not allege with sufficient specificity any emotional distress suffered by Taucher.

Nor have Plaintiffs stated a claim for tortious interference with business relations. A plaintiff must show: (1) That he or she had a business or contractual right that was interfered with; (2) That the interference was malicious and wrongful, and that such interference was neither justified, privileged nor excusable; (3) That damage was proximately sustained as a result of the

complained-of interference. Mac Adjustment Inc. v. Property Loss Research Bureau, 595 P.2d 427 (Okla. 1979). While Plaintiffs have alleged Defendants' conduct was malicious and unpriviliged, they have not successfully alleged that the Defendants are guilty of wrongful conduct, because they have not successfully stated a claim for libel.

Therefore Defendents Oster, Elder and FTS's Motion to Dismiss for failure to state a claim upon which relief can be granted is hereby GRANTED. Plaintiffs' Motion for Default Judgment was rendered moot by the Magistrate Judge's order allowing Defendant FTS to file its answer out of time.

IT IS SO ORDERED, this 12th day of August, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EDDIE OWENS, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	92-C-669-B
	)	
RON CHAMPION,	)	
	)	
Defendant.	)	

ORDER TO TRANSFER CAUSE

The Court having examined the Petition for Writ of Habeas Corpus which the Petitioner has filed finds as follows:

(1) That the Petitioner was convicted in Muskogee County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma.

(2) That the Petitioner demands release from such custody and as grounds therefore alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.

(3) In the furtherance of justice this case should be transferred to the United States District Court for the Eastern District of Oklahoma.

IT IS THEREFORE ORDERED:

(1) Pursuant to the authority contained in 28 U.S.C. §2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the Untied States District Court for the Eastern District of Oklahoma for all further proceedings.

(2) The Clerk of this Court shall mail a copy of this Order to the Petitioner.

Dated this 12th day of Aug, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. LESTER L. HERRON; NANCY HERRON; SERVICE COLLECTION ASSOCIATION, INC.; COUNTY TREASURER, Mayes County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, Defendants.	CIVIL ACTION NO. 91-C-405-C

DEFICIENCY JUDGMENT

This matter comes on for consideration this 12th day of August, 1992, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Farmers Home Administration, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendants, Lester L. Herron a/k/a Lester Leon Herron and Nancy Herron, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed by certified return receipt addressee restricted mail to Lester L. Herron a/k/a Lester Leon Herron and Nancy Herron, Rt. 2, Box 272, Choteau, Oklahoma 74337, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on January 2, 1992, in favor of the Plaintiff United

States of America, and against the Defendants, Lester L. Herron a/k/a Lester Leon Herron and Nancy Herron, with interest and costs to date of sale is $64,972.40.

The Court further finds that the appraised value of the real property at the time of sale was $16,500.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered January 2, 1992, for the sum of $21,000.00 which is more than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on July 28, 1992.

The Court further finds that the Plaintiff, United States of America on behalf of the Farmers Home Administration, is accordingly entitled to a deficiency judgment against the Defendants, Lester L. Herron a/k/a Lester Leon Herron and Nancy Herron, as follows:

Principal Balance as of 1-2-92	$40,706.59
Interest on Principal	11,358.80
Interest Credit Agreements	12,374.62
Interest on Interest Credit Agreements	145.03
Publication Fees of Notice of Sale	162.36
Court Appraisers' Fees	225.00
TOTAL	$64,972.40
Less Credit of Sale Proceeds -	21,000.00
DEFICIENCY	$43,972.40

plus interest on said deficiency judgment at the legal rate of 3.51 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the sale proceeds of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Farmers Home Administration have and recover from Defendants, Lester L. Herron a/k/a Lester Leon Herron and Nancy Herron, a deficiency judgment in the amount of $43,972.40, plus interest at the legal rate of 3.51 percent per annum on said deficiency judgment from date of judgment until paid.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PB/esr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEVIN PARK,

Plaintiff,

vs.

ARABESQUE CORPORATION, an Oklahoma corporation; and MONTE MORRIS FRIESNER, a bankrupt, by and through Ada Wynston, Trustee, and BETTE MITCHELL, an individual,

Defendants.

Case No. 91 C-198-B

ORDER VACATING DEFAULT AND GRANTING STAY

NOW on this 12th day of August, 1992, comes on for review the motion to vacate entry of default and for order staying this action as to Defendant, Monte Morris Friesner. For good cause shown, the Court finds that the motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the clerk's default is vacated and this matter is stayed as to the Defendant, Monte Morris Friesner, pending resolution of his Canadian Bankruptcy.

S/ THOMAS R. BRETT

Thomas R. Brett
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIE J. SCOTT,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services,

Defendant.

Case No. 90-C-1033-B

ORDER

This matter comes on for consideration of the objections of the Plaintiff, Willie J. Scott, to the Report and Recommendation ("R & R") of the United States Magistrate Judge. Plaintiff seeks review of the decision of the Secretary of Health and Human Services, denying him disability benefits, pursuant to 42 U.S.C. § 405(g). The matter was referred to the Magistrate Judge who entered his R & R on May 13, 1992. He recommends to affirm the Secretary's decision. (R & R, p. 6).

The Social Security Act ("Act") entitles every individual who "is under a disability" to disability benefits. 42 U.S.C.A. § 423(a)(1)(D) (1983). A person is disabled if he is unable to engage in any substantial gainful activity due to a medically determinable impairment. Id. § 423(d)(1)(A). The claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5)(1983). Once a disability is established, the Secretary must show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the

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national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987). The Secretary meets this burden if the decision is supported by substantial evidence.[1]

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, proceed as follows:

> (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
>
> (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
>
> (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
>
> (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
>
> (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

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[1] "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986).

The inquiry begins with step one, and if at any point the claimant is found to be disabled or not disabled, the inquiry ceases. Reyes, 845 F.2d at 242; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. §416.920 (1991).

Plaintiff here allegedly suffers from chronic back pain, high blood pressure, and gout. The present appeal focuses on the effects of his pain, and specifically whether it permits him hold substantial gainful employment. Two physicians examined Plaintiff to understand the extent of his impairment. The ALJ found that, based on all the symptoms, Plaintiff's impairments did not meet the strictures of 20 C.F.R. § 404, subpt. P, app. 1, and thus he failed to satisfy the third section of the test. (Record on Appeal, p. 12). The ALJ further concluded that Scott's physical condition allows him to perform "the full range of light work" as defined by 20 C.F.R. § 404.1567. Id.

Plaintiff objects to the ALJ's evaluation of the medical evidence and the Magistrate Judge's recommendation to affirm that decision. Scott further objects to the ALJ's reliance on the Medical-Vocational Guidelines, or "grids," in her determination that he was not disabled.[2] Plaintiff believes that the ALJ's

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[2] Appendix 2 to § 404, subpt. P contains the Medical-Vocational Guidelines, commonly referred to as the "grids." The grids are used to determine if an individual's residual functional capacity directs a finding of "disabled" or "not disabled" as defined in the guidelines. If an individual has solely nonexertional impairments, the grids "do not direct factual conclusions of disabled or not disabled." Where an individual has both exertional and nonexertional impairments, the grids are used first and, if they do not permit a conclusion, further inquiry is required.

improper evaluation of his testimony, coupled with her alleged invalid use of the grids and the subsequent failure to call a vocational expert, resulted in the incorrect conclusion that he can work on a regular basis. The Magistrate found error in neither the ALJ's evaluation of the medical evidence and the testimony of the Plaintiff, nor her failure to call a vocational witness. The Court agrees with the recommendation of the Magistrate Judge.

EVIDENCE OF DISABILITY

The Tenth Circuit gives substantial credence to the opinions of treating physicians on the subject of medical disability. A treating physician's opinion is binding on the fact finder unless it is contradicted by "substantial evidence," and the opinion is entitled to extra weight due to the physician's greater familiarity with the claimant's medical situation. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). Those conclusions can only be disregarded if specific, legitimate reasons are given by the ALJ. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

Scott's treating physician, Dr. Heim, felt that Scott had a "severe limitation of functional capacity" because of his back pain and that Plaintiff is "unable to do even sedentary work." (Record on Appeal, 116). Another physician, Dr. Young, offered different evidence. Young reported that the Plaintiff's problems, while painful, showed "no evidence of active nerve root entrapment or impingement" and further noted that his ability to

walk and grip was basically normal. (Record on Appeal, p. 130). The ALJ considered the evidence of both doctors, the testimony of Scott, and her own observations of the Plaintiff, and concluded that he was not afflicted with a "disabling" impairment. The ALJ considered all the evidence and the Magistrate Judge correctly found that substantial evidence supported the ALJ's ruling.

SUBJECTIVE PAIN

Plaintiff also contends that the ALJ and the Magistrate Judge failed to properly weigh his subjective claims of pain, using the "sit and squirm" test. The Tenth Circuit requires that, where a pain-causing impairment is isolated, the court must consider all evidence relating to the extent of the pain in this particular plaintiff. Luna v. Bowen, 834 F.2d 161, 164 (10th Cir. 1987). In the present case, the ALJ considered not only Plaintiff's appearance during the hearing, but also his testimony and medical records, evaluating all the symptoms and treatments. (Record on Appeal, p. 11). The ALJ made the determination that, based on all the relevant facts and the credibility of all the testimony, Scott's pain is not disabling under the Act. This judgment is binding on the district court if there is substantial probative evidence to support it. See Richardson v. Perales, 402 U.S. at 399; Broadbent v. Harris, 698 F.2d 407, 413 (10th Cir. 1983). Scott testified that he is able to garden, read, and conduct other household activities, proving that his afflictions do not significantly affect his daily life. (Record on Appeal, p. 11). The ALJ did not base her opinion solely on Plaintiff's

demeanor at the hearing. Substantial evidence supports the ALJ's conclusion that Plaintiff could participate in the national economy performing sedentary work.

USE OF GRIDS

Plaintiff claims that, since the nonexertional impairment "pain" was evident, use of the grids was improper and a vocational expert should have testified. This misstates the law with respect to the grids. The grids are properly referred to when a claimant has either exertional impairments alone or a combination of exertional and nonexertional impairments. 20 C.F.R. Pt. 404, Subpt. P, App. 2, §§ 200(e)(1)-(2); Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). The ALJ, after considering all the evidence in the record, found that the Scott's exertional and nonexertional impairments, when applied to the grid, directed a conclusion of "not disabled." Therefore no vocational expert was necessary. Since substantial evidence supported the ALJ's conclusion, no legal error was made and her decision stands.

The court agrees with and adopts the Magistrate Judge's Report and Recommendation, and orders that the decision of the Secretary be AFFIRMED.

IT IS SO ORDERED this 17th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOCAL AMERICA BANK OF TULSA, a federal savings bank,

Plaintiff,

vs.

DON E. GASAWAY, a/k/a DONALD E. GASAWAY, and GEORGANN GASAWAY, a/k/a GEORGANN S. GASAWAY, husband and wife; SUTTON INVESTMENTS, INC., an Oklahoma corporation; PIONEER SAVINGS AND INVESTMENT COMPANY, an Oklahoma corporation; BANK OF COMMERCE AND TRUST COMPANY; UNITED STATES OF AMERICA, ex rel. DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; JOHN CANTRELL, County Treasurer of Tulsa County, Oklahoma; THE BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA; CAMPBELL ENTERPRISES, INC., an Oklahoma corporation; BANK OF OKLAHOMA, N.A.; CORE INVESTMENT GROUP, INC.; JOHN W. MULLEN, JR.; BANKERS FINANCIAL LIFE COMPANY; SHERRON ERICKSON SMITH, Independent Executrix of the Estate of Stasia Ericksen, deceased; WALDO S. POWELL; and JOAN DODGE,

Defendants.

Case No. 91-C-148-E

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE

This cause comes on for hearing this 11th day of August, 1992, before the undersigned Judge of the United States District Court for the Northern District of Oklahoma. The Plaintiff, Local America Bank of Tulsa, a federal savings bank ("Local"),

JDH/08-92423/aas

appears through its attorneys of record, Rosenstein, Fist & Ringold, by Eric P. Nelson. The defendants, John W. Mullen, Jr. ("Mullen"), Waldo S. Powell ("Powell"), Sherron Ericksen Smith, independent executrix of the estate of Stasia Ericksen, deceased ("Smith") and Joan Dodge a/k/a Joann Dodge ("Dodge"), are in default and do not appear. The defendants, Pioneer Savings and Trust Company ("Pioneer"), Core Investment Group, Inc. ("Core"), Bankers Financial Life Company ("Bankers"), do not appear pursuant to Disclaimers of Interest filed in this action. The defendants, Don E. Gasaway, a/k/a Donald E. Gasaway, and Georgann Gasaway, a/k/a Georgann S. Gasaway, husband and wife ("Debtor Defendants"), the Successor Trustee for the Estate of Sutton Investments, Inc. ("Sutton"), the Federal Deposit Insurance Corporation in its corporate capacity as successor to all rights of Bank of Commerce & Trust Company in certain notes and mortgages involved herein ("FDIC") , United States of America, ex rel. Department of Treasury, Internal Revenue Service ("IRS"), The State of Oklahoma ex rel. Oklahoma Tax Commission ("OTC"), John Cantrell, County Treasurer of Tulsa County, Oklahoma ("Cantrell") , The Board of County Commissioners of Tulsa County, Oklahoma ("Board"), Campbell Enterprises, Inc. ("Campbell"), and Bank of Oklahoma, N.A. , Southwest, Tulsa, Oklahoma ("BOk") appear through their attorneys of record. The Court, having examined the pleadings, and having heard statements offered by counsel for Local, makes the following findings:

1. This Court finds that it has jurisdiction over the subject matter and all the parties to this cause of action.

JUDGMENT IN FAVOR OF LOCAL

2. The Court finds that all of the defendants to this action except Sutton were served with a summons and a copy of Local's Complaint, First Amendment to Complaint and Second Amendment to Complaint, as evidenced by the verified returns of service and certificates of mailing filed herein. Sutton was not served due to the automatic stay imposed by its bankruptcy filing in the United States Bankruptcy Court for the Northern

District of Louisiana-Opelousas Division, Case No. 80-50938. However, Sutton voluntarily entered an appearance in this case on September 26, 1991. The stay in the Sutton bankruptcy was modified on November 25, 1991, allowing all parties with pending claims in the action herein to prosecute the claims to judgment and enforce them against Sutton.

3. The Court further finds that Dodge, Mullen, Powell and Smith have not made any response to Local's Complaint, First Amendment to Complaint and Second Amendment to Complaint and that they are in default pursuant to Fed. R. Civ. P. Rule 12.

4. On September 16, 1991, Local filed a Motion for Partial Summary Judgment against all defendants except Sutton and Dodge. The Debtor Defendants and the remaining defendants did not respond, except the FDIC which did not object to the validity or the priority of Local's interest nor raise any factual dispute but objected to the fees requested to be added to Local's judgment. The FDIC has consented to the terms of this Judgment.

5. On December 6, 1991, Local filed its Motion for Partial Summary Judgment against Sutton and Dodge, to which Sutton and Dodge did not respond.

6. The Court further finds that all the allegations contained in Local's Complaint, First Amendment to Complaint and Second Amendment to Complaint are true and that Local is entitled to a judgment against the Debtor Defendants in the principal amount of $33,824.95, with interest at the rate of 8.75% per annum as provided in Note I (attached to Local's Petition as Exhibit "A"), from June 1, 1990, until paid, plus judgment for abstracting costs of $933.00, plus judgment for $2,210.51 in late charges, plus judgment for escrow deficiency of $3,995.78, and judgment in the principal amount of $12,054.93, with interest at the rate of 11.04% per annum as provided in Note II (attached Local's Petition as Exhibit "C"), from April 20, 1990, until paid, plus judgment for $110.00 in late charges, plus judgment for attorney's fees in the amount of

$10,400.83, plus judgment for all other costs of this action accrued and accruing, all to bear interest at the statutory rate from the date of judgment until paid.

7. The Court further finds that Local has valid, first and prior mortgage liens on the improvements and real estate described in the Petition by virtue of mortgages given to secure payment of the indebtedness. The real estate is described as follows:

> All that part of Lots Eighteen (18) and Nineteen (19), Block Eight (8), WOODLAND HEIGHTS, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof, described as follows, to-wit:
>
> Beginning at the Southeast corner of said Lot 18, thence North along the East line of said Lot 18, a distance of One hundred twenty-three and two tenths (123.2) feet to the Northeast corner of said Lot; thence West along the North line of said Lot, a distance of one hundred seven and five tenths (107.5) feet to a point on the North line of said Lot; thence Southerly on a straight line to a point on the South line of said Lot 19, Seventy (70) feet West of the Southeast corner of said Lot 19; thence East along the South line of 19 and 18, one hundred seventy (170) feet to the Southeast corner of said Lot 18, the point of beginning (the "Property").

8. The Court further finds that the United States has good and valid tax liens which are identified as follows:

Name of Taxpayer	Date of Lien	Date Lien Recorded	Total Amount
Don E. & Georgann Gasaway	05/13/85	08/29/86	$13,600.68
Don E. & Georgann Gasaway	12/02/85	08/29/86	$39,905.10
Don E. & Georgann Gasaway	05/13/85	05/27/86	$17,596.79
Don E. & Georgann Gasaway	12/02/85	05/27/86	$39,096.89
Don E. Gasaway	02/27/90	05/21/90	$20,762.04
Don E. Gasaway	09/11/89	02/12/90	$59,286.26
Don E. Gasaway	11/25/85	10/20/86	$15,215.35
Don E. Gasaway	02/27/89	05/15/89	$12,761.10

The total amount of these tax liens is $218,224.21, plus interest, credits and penalties, if applicable, from the dates of tax assessments until paid. The United States shall have its statutory right of redemption.

9. The Court further finds that the State of Oklahoma, ex rel Oklahoma Tax Commission, has good and valid tax liens which are identified as follows:

Name of Taxpayer	Date Warrant Issued	Date Warrant Issued	Warrant Number	Amount
(1) Don E. & Georgann Gasaway	02/02/85	09/06/85	ITI0002120500	$6,903.01
(2) Don E. & Georgann Gasaway	05/12/86	05/12/86	ITI8600318500	$6,913.08
(3) Don E. Gasaway	08/17/87	08/19/87	ITW8700065201	$2,988.64
(4) Don E. & Georgann Gasaway	05/11/88	05/13/88	ITI8800536100	$1,346.51
(5) Don E. & Georgann Gasaway	08/17/90	08/22/90	ITI9001276100	$1,972.76

The total amount of these tax warrants is $20,124.00, plus penalty and interest according to law, attorneys' fees and costs.

10. The Court further finds that any interest that the Debtor Defendants, Mullen, Powell, Smith, Dodge, Pioneer, Core, Bankers, Sutton, FDIC, IRS, OTC, Cantrell, Board, Campbell and BOk claim in the Property is inferior, subsequent and subordinate to Local's claim in the Property.

11. The Court further finds that Local elects to have the Property sold with appraisement and such election is approved and the sale shall be with appraisement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court as follows:

A. That Local America Bank of Tulsa, a federal savings bank, shall have and recover of and from the defendants, Don E. Gasaway, a/k/a Donald E. Gasaway, and Georgann Gasaway, a/k/a Georgann S. Gasaway, judgment in the principal amount of $33,824.95, with interest at the rate of 8.75% per annum as provided in Note I (attached to Local's Petition as Exhibit "A"), from June 1, 1990, until paid, plus judgment for abstracting costs of $933.00, plus judgment for $2,210.51 in late charges, plus judgment for escrow deficiency of $3,995.78, and judgment in the principal amount of $12,054.93, with interest at the rate of 11.04% per annum as provided in Note II (attached to Local's Petition as Exhibit "C"), from April 20, 1990, until paid, plus judgment for $110.00 in late charges, plus judgment for attorney's fees in the amount of $10,400.83, all to bear interest at the statutory rate from the date of judgment until paid, all of which constitute a lien on the Property until paid.

B. That Local has first and prior mortgages on the real estate and improvements on the Property. The mortgage liens of Local are adjudged and established to be a good and valid liens upon the Property and Local's judgment indebtedness is secured by the liens. Any and all right, title and interest which the defendants, Don E. Gasaway, a/k/a Donald E. Gasaway, and Georgann Gasaway, a/k/a Georgann S. Gasaway, husband and wife, John W. Mullen, Jr., Waldo S. Powell, Sherron Ericksen Smith, independent executrix of the estate of Stasia Ericksen, deceased, Joan Dodge a/k/a Joann Dodge, Pioneer Savings and Trust Company, Core Investment Group, Inc., Bankers Financial Life Company, the Successor Trustee for the Estate of Sutton Investments, Inc., the Federal Deposit Insurance Corporation in its corporate capacity as successor to all rights of Bank of Commerce & Trust Company in certain notes and mortgages involved herein (FDIC), United States of America ex rel. Department of Treasury, Internal Revenue Service, The State of Oklahoma ex rel. Oklahoma Tax Commission, John Cantrell, County Treasurer of Tulsa County, Oklahoma, The Board of County Commissioners of Tulsa County, Oklahoma, Campbell Enterprises, Inc. and Bank of Oklahoma, N.A., Southwest, Tulsa, Oklahoma, have or claim in the Property, is subsequent, junior, subordinate and inferior to the mortgage liens of Local.

C. Upon the failure of the defendants, Don E. Gasaway, a/k/a Donald E. Gasaway, and Georgann Gasaway, a/k/a Georgann S. Gasaway, husband and wife, to satisfy the liens described above, the Marshal of the United States District Court for the Northern District of Oklahoma, or the Sheriff of Tulsa County, Oklahoma, as Local shall choose, shall levy upon the Property, after having the Property appraised as provided by law; shall proceed to advertise and sell the Property according to law; and shall immediately turn over the proceeds of the sale to the District Court Clerk, who shall apply the proceeds arising from the sale as follows: first, to payment of costs of this action incurred by Local and costs of the sale, including attorney's fees of Local's counsel; second, to satisfy the judgment of Local as set forth. in this journal entry; third, the residue, if any, shall be distributed as set forth below.

D. From and after the sale of the Property, all the parties to this action and each of them, and all persons claiming under them or any of them shall be and they are hereby forever barred and foreclosed from any and every lien upon, right, title, estate and equity of redemption, in or to the Property, or any portion thereof except the right of redemption afforded the FDIC and the IRS under 28 U.S.C. §2410(c).

E. Upon confirmation of the sale ordered, the Marshal of the United States District Court for the Northern District of Oklahoma or the Sheriff of Tulsa County, Oklahoma, as Local shall have chosen to conduct the sale ordered, shall execute and deliver a good and sufficient deed to the Property to the purchaser, and upon application of the purchaser, the Court shall issue a writ of assistance to the Marshal or the Sheriff who shall place the purchaser in full and complete possession and enjoyment of the Property.

JUDGMENT IN FAVOR OF THE FDIC AND SUTTON

11. On September 16, 1991, the FDIC filed its Motion for Partial Summary Judgment and for Entry of Judgment Based Upon Disclaimers against all the defendants in this case except Sutton and Dodge. On November 4, 1991, FDIC filed an Amendment to its Brief in Support of Motion for Partial Summary Judgment and For Entry of Judgment Based Upon Disclaimers. The Debtor Defendants did not respond.

12. On November 20, 1991, FDIC filed its Amendment to its Cross-Claim (filed March 18, 1991) to include defendant Dodge. The defendant Dodge was served with a summons on November 26, 1991, and is in default; therefore, any claim or interest of Dodge in the Property which is the subject of these proceedings is junior and inferior to any claim of the FDIC.

13. On November 19, 1991, John W. Mullen, Jr., Waldo S. Powell and Sherron Ericksen Smith, independent executrix of the Estate of Stasia Ericksen, deceased, filed a Partial Release of Journal Entry of Default Judgment in John W. Mullen, Jr., et al. vs. 15th Street Properties, et al., Case No. CJ-85-06902 releasing and discharging the

Property in this case from their judgment lien, and the Property is no longer encumbered by such judgment liens.

14. The Court finds that all of the allegations contained in FDIC's Motion for Partial Summary Judgment are true and that FDIC is entitled to a judgment against Don E. Gasaway and Georgann S. Gasaway, jointly and severally, in the principal sum of $258,520.07, together with accrued interest through January 21, 1992, of $269,989.49, with interest accruing after January 21, 1992, in the per diem amount of $113.32, along with all costs and expenses of this action and all costs and expenses incurred in preserving and protecting the Property, including a reasonable attorneys' fee and all abstracting and title commitment expenses.

15. Prior to May 8, 1986, Bank of Commerce & Trust Company ("BOC") was a banking corporation organized under the laws of the State of Oklahoma, with its principal place of business in Tulsa, Oklahoma. The Oklahoma State Banking Commissioner (the "Commissioner") assumed exclusive custody and control of the property and affairs of BOC, pursuant to tit. 6, Okla. Stat. S 1202(b), at the close of business on May 8, 1986. The Commissioner subsequently tendered to the Federal Deposit Insurance Corporation appointment as Liquidating Agent of BOC, pursuant to tit. 6, Okla. Stat S 1205(b). The Federal Deposit Insurance Corporation, as Liquidating Agent, sold certain of the assets of BOC to the Federal Deposit Insurance Corporation in its corporate capacity, referred to herein as the "FDIC." Among the assets included in the transfer were the notes and mortgages which are the basis of the FDIC's Cross-Claim. The FDIC is now the owner and holder of those assets.

16. On or about April 3, 1979, Don E. Gasaway and Georgann Gasaway (hereinafter collectively referred to as the "Gasaways"), for good and valuable consideration, made, executed and delivered to Pioneer Savings & Trust Company ("Pioneer") their Promissory Note ("FDIC Note 1"), whereby the Gasaways promised to pay to Pioneer the principal sum of $31,196.00 with interest thereon from that date. To

secure repayment of FDIC Note I, the Gasaways also made, executed and delivered in favor of Pioneer their Mortgage of Real Estate ("FDIC Mortgage I") covering the Property dated April 3, 1979.

17. On or about December 4, 1979, the Gasaways, for good and valuable consideration, made, executed and delivered to Pioneer their Promissory Note ("FDIC Note III") in the principal sum of $21,163.50, with interest thereon from that date. To secure repayment of FDIC Note II and all other indebtedness and obligations of the Gasaways or either of them to Pioneer, the Gasaways also made, executed and delivered in favor of Pioneer their Mortgage of Real Estate ("FDIC Mortgage III") covering the Property dated December 4, 1979.

18. On or about May 8, 1980, the Gasaways, for good and valuable consideration, made, executed and delivered to Pioneer their Promissory Note ("FDIC Note III") in the principal sum of $31,666.30 with interest thereon from that date. To secure repayment of FDIC Note III and all other indebtedness and obligations of the Gasaways or either of them to Pioneer, the Gasaways also made, executed and delivered in favor of Pioneer their Mortgage of Real Estate ("FDIC Mortgage III") covering the Property dated May 8, 1980.

19. On or about June 3, 1981, Don Gasaway made, executed and delivered to Pioneer his Promissory Note ("FDIC Note IV") in favor of Pioneer in the principal sum of $12,500.00.

20. On or about January 21, 1982, Don Gasaway made, executed and delivered to Pioneer his Promissory Note in the amount of $24,000.00 ("FDIC Note IA"). On or about May 21, 1982, Don Gasaway signed an Extension Note, renewing and extending his indebtedness and obligations to Pioneer under FDIC Note IA ("Extended FDIC Note IA"). To secure repayment of Extended FDIC Note IA and all other indebtedness and obligations of the Gasaways, or either of them, to Pioneer, the Gasaways made, executed and delivered to Pioneer their Real Estate Mortgage ("FDIC Mortgage IA") dated May 21,

1982. On June 29, 1983, the balance of Extended FDIC Note IA was moved to FDIC Note I and FDIC Note II and treated as an additional advance under FDIC Note I and FDIC Note II, with $16,186.45 added to the balance of FDIC Note I and $2,638.03 added to the balance of FDIC Note II.

21. Pioneer then assigned FDIC Notes I, II, III and IV, as they may have been amended, extended or renewed from time to time (the "Notes") and FDIC Mortgages I, IA, II and III (the "FDIC Mortgages") to Victor Federal Savings & Loan ("Victor"), as evidenced in part by that Assignment of Real Estate Mortgage dated March 14, 1985, by Pioneer in favor of Victor (the "Pioneer-Victor Assignment") and recorded in Book 4850, beginning at Page 433 in the records of the County Clerk of Tulsa County, Oklahoma, on March 15, 1985. Pioneer also endorsed all the FDIC Notes to Victor.

22. On or about September 5, 1985, BOC loaned the Gasaways $270,000.00, and the Gasaways to evidence their obligation to repay that loan in turn signed in favor of BOC a Promissory Note dated August 27, 1985, in the original principal amount of $270,000.00 (the "BOC Note"). The BOC Note represented a new extension of credit to the Gasaways along with a consolidation of all the Gasaways' indebtedness to Pioneer, all of which had been assigned to Victor.

23. In connection with the execution of the BOC Note, BOC acquired all Victor's right, title and interest in and to the FDIC Notes and the FDIC Mortgages, as evidenced in part by that Assignment of Real Estate Mortgages ("Assignment") dated September 5, 1985. The Assignment was duly recorded at Book 4890, beginning at Page 1143, in the records of the Tulsa County Clerk on September 10, 1985.

24. The last payment BOC received on account of the BOC Note was in July of 1986.

25. The BOC Note and the separate mortgage specifically securing its repayment which covered unrelated property, were the subject of a foreclosure action in the case styled Bank of Oklahoma, Southwest vs. 15th Street Properties, et al., Case No.

CJ-88-6862, in the District Court in and for Tulsa County, State of Oklahoma (the "Unrelated Case"). In the Unrelated Case, the unrelated property was sold for credit on the judgment in favor of the first mortgagee, Bank of Oklahoma, Southwest, and the FDIC realized no proceeds from the sale of the unrelated property. The FDIC's Motion for Deficiency Judgment under the BOC Note is still pending in the Unrelated Case.

26. The Gasaways would be entitled to credit under the BOC Note for all proceeds realized in this foreclosure action by the FDIC because the indebtedness represented by the BOC Note is also secured in part by the FDIC Mortgages.

27. Repayment of the BOC Note was also secured by that Security Agreement dated August 27, 1985, by the Gasaways in favor of the Bank. The property covered by the Security Agreement included all accounts receivable and general intangibles of the Gasaways and is hereinafter referred to as the "Separate Personal Property". BOC's security interest in the Separate Property was duly and properly perfected by the filing of financing statements in the UCC records of the Oklahoma and Tulsa County Clerks on September 10, 1985, and September 6, 1985.

28. The BOC Note matured in August of 1986.

29. The BOC Note is in default because the FDIC has not received payments due thereunder. Pursuant to such default, the FDIC has declared the entire principal balance and all unpaid interest and all other sums owing under the BOC Note due and payable. Additionally, due to such default under the BOC Note, the Mortgages and the Security Agreement are also in default and the FDIC is entitled to foreclose the Mortgage and the Security Agreement and is entitled to have the Property and the Separate Personal Property encumbered thereby sold, subject to Local's first and prior right to have the Property sold and the proceeds applied as set forth herein, to satisfy the portion of the indebtedness due and owing under the BOC Note which is secured by the FDIC Mortgages and the Security Agreement.

30. The portions of the BOC Note Indebtedness represented by the FDIC Notes and secured by the FDIC Mortgages are set forth below, and the Court hereby grants the FDIC judgment against Don E. Gasaway and Georgann Gasaway in these amounts:

FDIC Note		Principal	Interest Thru 12/31/91	Attorneys' Fees and Expenses
I	(original debt incurred 4/3/79)	$ 15,049.55	$20,378.33	$3,734.99
I	(from Note IA - incurred 1/21/81)	16,186.45	17,965.53	3,214.88
II	(original debt incurred 12/4/79)	18,076.49	20,063.31	3,590.24
II	(from Note IA - incurred 1/21/81)	2,638.03	2,928.01	523.95
III		28,403.33	31,350.65	5,624.92
IV		2,372.13	2,379.76	447.32

and including additional attorneys' fees, costs and expenses incurred attributable to the Mortgages on the Property.

31. The right, title, lien, estate, encumbrance, claim, assessment or interest in and to the Property, the Separate Personal Property or portions thereof, claimed by any and all of the FDIC's co-defendants other than Sutton are subject, junior and inferior to the lien of the FDIC's Mortgages encumbering the Property and the Security Agreement on the Separate Personal Property.

32. Sutton Investments, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Oklahoma with its principal place of business located in the City of Tulsa, Tulsa County, Oklahoma. On April 24, 1984, Sutton Investments, Inc. filed for protection under the provisions of Title 11 of the United States Code in the United States Bankruptcy Court for the Western District of Louisiana. Hugh William Thistlethwaite, Jr. was subsequently appointed Trustee of the Estate. The Court reacted to the death of Trustee Hugh William Thistlethwaite, Jr. by appointing Paul DeBaillon as Successor Trustee. Among the assets of the Estate were the Promissory Note (the "Sutton Note") and the Real Estate Mortgage (the "Sutton Mortgage") which is the basis of the Successor Trustee's claim herein. The Estate is now the owner and holder of those assets and thus is the real party in interest.

33. On or about April 30, 1980, the Gasaways, for good and valuable consideration, made, executed and delivered to Texanna Holding and Land Co. ("Texanna") the Sutton Note whereby the Gasaways promised to pay to Texanna the principal sum of Eighty Thousand Dollars ($80,000.00) with interest thereon from the date of the Note as set forth within the Note.

34. In order to secure the Sutton Note, the Gasaways made, executed and delivered in favor of Texanna Holding and Land Co. the Sutton Mortgage covering the Property. The Sutton Mortgage was duly recorded in Book 4524 beginning at Page 194, in the records of the County Clerk of Tulsa County, Oklahoma, on January 30, 1981, after the required mortgage tax was paid.

35. On or about April 30, 1980, Texanna, for sufficient, good and valuable consideration, assigned the Sutton Note and Sutton Mortgage to Sutton Investments, Inc. by an Assignment of Mortgage (the "Sutton Assignment") which was duly recorded in the records of the County Clerk of Tulsa County, Oklahoma, on January 30, 1981, at Book 4524, beginning at Page 195.

36. The Sutton Note is in default because neither Texanna, Sutton Investments, Inc., the Trustee nor the Successor Trustee have received payments due thereunder. Counsel for the Trustee and the Successor Trustee has made repeated requests and demands for the payment of principal and interest and has noticed the Gasaways as required by the Sutton Note and Sutton Mortgage. Pursuant to such default, the Successor Trustee has declared the entire principal balance and all unpaid interest and all other sums owing under the Sutton Note due and payable. Additionally, due to such default under the Sutton Note, the Sutton Mortgage is also in default and the Successor Trustee is entitled to foreclose the Sutton Mortgage and is entitled to have the property encumbered thereby sold to satisfy the indebtedness due and owing under the Sutton Note and secured by the Sutton Mortgage.

37. There is now due and owing under the Sutton Note to the Successor Trustee the principal sum of Eighty Thousand Dollars ($80,000.00), together with accrued interest through December 13, 1991, of Ninety-Two Thousand, Nine Hundred Eighty Three and 57/100 Dollars ($92,983.57), plus interest after December 13, 1991, in the per diem amount of Twenty-one and 92/100 Dollars ($21.92), all of which is due and unpaid.

38. Pursuant to the terms of the Sutton Note and Sutton Mortgage, the Successor Trustee is entitled to collect a reasonable attorney's fee of $14,092.90.

39. The Defendant Sutton's interest in the Property is junior and inferior to the FDIC's interest under the FDIC Mortgages except as set forth below:

Priority of Payment from Proceeds of Property
(Between FDIC and Sutton)

Priority Between FDIC and Sutton	Mortgagee	Debt Instrument	Amount (Principal) Plus Interest Thru 12/13/91, Fees and Expenses	Per Diem After 12/13/91	Date Debt Incurred
1	FDIC	FDIC Note I	$39,162.87	$ 6.60	04/03/79
2	FDIC	FDIC Note II	41,730.04	7.92	12/04/79
3	FDIC	FDIC Note III	65,378.90	12.45	05/08/80
4	Sutton	Sutton Note	185,786.47	21.92	01/30/81
5	FDIC	FDIC Note IV	5,199.21	1.03	06/03/81
6	FDIC	FDIC Note I (from FDIC Note IA)	37,366.86	7.09	01/21/82
7	FDIC	FDIC Note II (from FDIC Note IA)	6,089.99	1.16	01/21/82

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court as follows:

A. That the Defendant, Federal Deposit Insurance Corporation shall have and recover of and from the defendants, Don E. Gasaway, a/k/a Donald E. Gasaway, and Georgann Gasaway, a/k/a Georgann S. Gasaway, jointly and severally, judgment in the principal amount of $258,520.07, together with accrued interest through March 13, 1991, of $231,445.12, with interest accruing after March 13, 1991, in the per diem amount of $129.26, along with all costs and expenses of this action and all costs and expenses

incurred in preserving and protecting the Property, including a reasonable attorney's fee as described above and all abstracting and title commitment expenses, with postjudgment interest thereon at the legal rate.

B. The FDIC and Sutton have valid mortgage liens on the Property and the FDIC has a valid security interest in the Separate Personal Property and such liens are hereby adjudged and established to be good and valid liens upon said property superior to any interest of all defendants.

C. Upon the failure of Debtor Defendants to satisfy the judgment described above and subject to Local's first and prior right to have the Property sold and the proceeds applied as set forth herein, the Marshal of the United States District Court for the Northern District of Oklahoma ("Marshal"), or the Tulsa County Sheriff (the "Sheriff"), as the FDIC or Sutton may choose, shall levy upon the Property and improvements thereon, and after having the same appraised as provided by law, shall proceed to advertise and sell the same according to law, and shall immediately turn over the proceeds thereof to the District Court Clerk, who shall apply the proceeds arising from said sale as follows:

(1) First, in payment of the costs and expenses incurred by Local including costs of sale, all court costs and attorney's fees of Local's counsel;

(2) Second, in payment to Local of its judgment hereinabove set forth;

(3) Third, in payment of the portions of the indebtedness to the FDIC listed above as prior to Sutton;

(4) Fourth, in payment to Sutton of its judgment hereinabove set forth; and

(5) Fifth, in payment of the portions of the indebtedness to the FDIC listed above as junior to Sutton; and

(6) The residue, if any, shall be deposited with the Clerk of this Court to await further Order of this Court.

D. At the request of the FDIC and upon the failure of the Debtor Defendants to satisfy the judgment described above, the Marshal or the Sheriff, as the FDIC may choose, shall levy upon the Separate Personal Property, and shall proceed to advertise and sell the same according to law, and shall immediately turn over the proceeds thereof to the District Court Clerk, who shall apply the proceeds arising from said sale to the costs of sale first and then to the FDIC's judgment as set forth above; provided, however, that nothing herein shall require the FDIC to execute upon the Separate Personal Property as a condition to execution upon the Property nor shall the FDIC waive or otherwise fail to retain its rights to execute upon the Separate Personal Property in the future by virtue of first executing upon the Property.

E. From and after the sale of the Property, all of the parties to this action, and each of them, and all persons claiming under them or any of them, shall be and are hereby forever barred and foreclosed of and from any and every lien upon right, title, estate or equity of redemption in or to the Property, or any portion thereof.

F. Upon confirmation of the sale(s) hereinabove ordered, the Marshal or Sheriff shall execute and deliver a good and sufficient deed and/or bill of sale, as appropriate, to the Separate Personal Property and the Property to the purchaser, which deed shall convey all of the right, title, interest, estate and equity of redemption of all the parties herein, and all persons claiming under all of the parties herein, and each of them, since the filing of this action, and upon application of the purchaser, the Court Clerk shall issue a writ of assistance to the Marshal or Sheriff who shall thereupon and forthwith place said purchaser in full and complete possession and enjoyment of the Separate Personal Property and in the Property.

S/ JAMES O. ELLISON

JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

/s/

Eric P. Nelson, OBA #11941
Rosenstein, Fist & Ringold
525 S. Main, Suite 300
Tulsa, Oklahoma 74103
(918) 585-9211

ATTORNEYS FOR LOCAL AMERICA BANK
OF TULSA, A FEDERAL SAVINGS BANK

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, Local America Bank of Tulsa v. Don E. Gasaway, et al., Case No. 91-C-148-E in the U.S. District Court for the Northern District of Oklahoma.

APPROVED AS TO FORM:

P. Scott Hath

Tony W. Haynie, OBA #11097
P. Scott Hathaway, OBA #13695
2400 First National Tower
Tulsa, Oklahoma 74103

ATTORNEYS FOR PAUL DEBAILLON,
SUCCESSOR TRUSTEE FOR THE ESTATE
OF SUTTON INVESTMENTS, INC.

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, Local America Bank of Tulsa v. Don E. Gasaway, et al., Case No. 91-C-148-E in the U.S. District Court for the Northern District of Oklahoma.

APPROVED AS TO FORM:

Jeffrey D. Hassell, OBA #12325
Gable & Gotwals
2000 Fourth National Bank Bldg.
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEYS FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION ON BEHALF OF BANK OF COMMERCE & TRUST COMPANY

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, Local America Bank of Tulsa v. Don E. Gasaway, et al., Case No. 91-C-148-E in the U.S. District Court for the Northern District of Oklahoma.

APPROVED AS TO FORM:

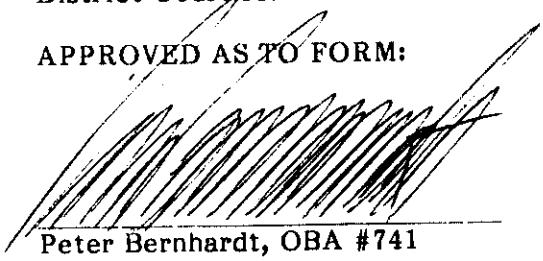
Diane Allbaugh

M. Diane Allbaugh, OBA #14667
Assistant General Counsel
Oklahoma Tax Commission
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248

ATTORNEY FOR THE STATE OF OKLAHOMA
EX REL. OKLAHOMA TAX COMMISSION

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, Local America Bank of Tulsa v. Don E. Gasaway, et al., Case No. 91-C-148-E in the U.S. District Court for the Northern District of Oklahoma.

APPROVED AS TO FORM:



Peter Bernhardt, OBA #741
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

ATTORNEY FOR UNITED STATES OF AMERICA EX REL. DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, Local America Bank of Tulsa v. Don E. Gasaway, et al., Case No. 91-C-148-E in the U.S. District Court for the Northern District of Oklahoma.

APPROVED AS TO FORM:

J. Dennis Semler, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 584-0440

ATTORNEY FOR JOHN CANTRELL, COUNTY TREASURER OF TULSA COUNTY, OKLAHOMA, AND THE BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, Local America Bank of Tulsa v. Don E. Gasaway, et al., Case No. 91-C-148-E in the U.S. District Court for the Northern District of Oklahoma.

APPROVED AS TO FORM:

Michael Gibbens
Jones, Givens, Gotcher & Bogan
3800 First National Tower
Tulsa, Oklahoma 74103-4309
(918) 581-8200

ATTORNEYS FOR CAMPBELL ENTERPRISES, INC.

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, Local America Bank of Tulsa v. Don E. Gasaway, et al., Case No. 91-C-148-E in the U.S. District Court for the Northern District of Oklahoma.

APPROVED AS TO FORM:

Scott E. Coulson

Scott E. Coulson, OBA #12622
Robinson, Lewis, Orbison, Smith & Coyle
P.O. Box 1046
Tulsa, Oklahoma 74101
(918) 583-1232

ATTORNEYS FOR BANK OF OKLAHOMA, N.A., SUCCESSOR BY MERGER TO BANK OF OKLAHOMA, SOUTHWEST TULSA

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, Local America Bank of Tulsa v. Don E. Gasaway, et al., Case No. 91-C-148-E in the U.S. District Court for the Northern District of Oklahoma.

APPROVED AS TO FORM:

_____

Ronald C. Bennett
2828 E. 51st St.
Suite 204
Tulsa, Oklahoma 74159

ATTORNEY FOR GEORGANN GASAWAY

AGREED JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, Local America Bank of Tulsa v. Don E. Gasaway, et al., Case No. 91-C-148-E in the U.S. District Court for the Northern District of Oklahoma.

APPROVED AS TO FORM:

DON E. GASAWAY, PRO SE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD LEE DIES,

Plaintiff,

vs.

GROUP BENEFIT PLAN FOR EMPLOYEES OF AMCA INTERNATIONAL CORPORATION, and JASON, INC., HEALTH AND WELFARE PLAN,

Defendants.

Case No. 91-C-195-B

ORDER OF DISMISSAL WITH PREJUDICE

The Plaintiff and Defendants having compromised and settled all issues in the action and having stipulated that the Complaint and the action may be dismissed with prejudice, it is therefore,

ORDERED, that the Complaint and this cause of action are, by the Court, dismissed with prejudice to the bringing of another action upon the same cause or causes of action.

Entered this 12th day of August, 1992.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

8/13/92

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STEPHAN D. WILLIS, Plaintiff,	)	
vs.	)	Case No. 91-C-842-B
STANLEY GLANZ, *et al.*, Defendants.	)	

2

JUDGMENT

Pursuant to the Order filed herein on August 3, 1992, Judgment is hereby granted to the Defendants against the Plaintiff. All parties shall bear their own expenses.

It is so ordered on this 12th day of August, 1992.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

SMITH FURNITURE MAKERS, INC.,

Plaintiff,

vs.

NEW ANTIQUES, INC., an Oklahoma corporation; OAK MART, INC., an Oklahoma corporation; NEW ANTIQUES, INC., a Missouri corporation; NEW ANTIQUES, INC., a Nebraska corporation; NEW ANTIQUES, INC., an Iowa corporation; NEW ANTIQUES, INC., a Texas corporation; NEW ANTIQUES, INC., an Illinois corporation; NEW ANTIQUES, INC., an Ohio corporation; and NEW ANTIQUES OF KANSAS, INC., a Kansas corporation;

Defendants.

Case No. 92-C-557-B

NOTICE OF DISMISSAL

COMES NOW, Smith Furniture Makers, Inc. Plaintiff, pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure and dismisses with prejudice its Complaint and Motion for Temporary Restraining Order in the above styled cause.

No answer or entry of appearance has been filed by any Defendant herein.

Respectfully submitted,

DAVID B. SCHNEIDER, OBA #7969
210 West Park Avenue, Suite 1120
Oklahoma City, Oklahoma 73102
(405) 232-9990

Attorney for Plaintiff, Smith Furniture Makers, Inc.

C:\United\Antiques\Dismiss

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOROTHY DEWITTY, EMANUEL PALMER, SAM ALLEN, GERALD DAVIS, STEVEN HERRIN, LORRAINE HAYNES, DWAYNE JOHNSON, and SAM PARKER

Plaintiffs,

VS.

PLEAS THOMPSON, CHARLES RUBLE, RENEE CROOK, ELLOUISE COCHRANE, JERRY JENNINGS, and ZETTIE WILLIAMS.

Defendants.

CASE NO. 92-C-692-B

ORDER

This matter comes on for consideration of Plaintiffs' Motion To Remand and Defendants' Motion To Dissolve And/Or Modify Temporary Restraining Order.

Plaintiffs, alleging they are Board members of the Tulsa Community Action Agency (TCAA), filed an action on August 3, 1992, in the District Court for Tulsa County, Oklahoma, within the Northern District of Oklahoma, seeking to enjoin a scheduled members meeting called by Defendants and set for August 6, 1992, at 6 p.m.. The state Court entered its Temporary Restraining Order enjoining Defendants from conducting the scheduled members meeting and further enjoining Defendants, and particularly Defendant Pleas Thompson, from canceling a Directors Meeting scheduled by Plaintiffs (after the members meeting had been set) also for August 6, 1992, at 6 p.m..

The Court concludes herein:

1. That it has federal question jurisdiction because of Plaintiffs' Complaint allegations that federal monies through the Head Start Program (administered by TCAA) were involved, federal regulations were allegedly violated, federal contracts were violated, and other federal issues growing out of this dispute were impacted. Plaintiffs Motion To Remand is herewith DENIED.

2. Plaintiffs shall within 15 days from the date of this Order move to certify the class they purport to represent, failing which this matter shall not be maintained as a class action.

3. That the appointment of a Special Master in this matter is appropriate in view of the issues herein and the alleged size of the membership of TCAA. The Court appoints as Special Master Steven Dow, which has been concurred in by the parties.

4. Until further Order of the Court, the pleading and time requirements provided for in the Federal Rules of Civil Procedure and the Local Rules for the Northern District of Oklahoma are hereby suspended in this matter.[1]

IT IS SO ORDERED this 11th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1] The Court concludes suspension is, at this time, necessary to minimize legal expenses without jeopardizing substantial rights of the parties by failure to respond and/or plead as provided in the rules.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES L. HUGHART,

Plaintiff,

v.

ONEOK INC.,

Defendant.

Civil Action No. 92-C-388-E

ORDER

There being no response to Defendant's Motion to Dismiss and more than fifteen (15) days having passed since the filing of the motion, and the extension of time obtained by the Plaintiff having expired, the Court, pursuant to Local Rule 15(a), concludes that the Plaintiff has therefore waived any objection or opposition to the Motion to Dismiss. See Woods Construction Company v. Atlas Chemical Industries, Inc., 337 F.2d 888, 890 (10th Cir. 1964).

The Motion to Dismiss is therefore granted.

S/ JAMES O. ELLISON

James O. Ellison
United States District Judge

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

FINA OIL AND CHEMICAL COMPANY, AMERICAN COMETRA, INC. and COREXCAL, INC.,

Plaintiffs,

vs.

MESA GRANDE, LTD., a New Mexico limited partnership, and its General Partners, THE LINDRITH COMPANY, LTD. and MESA GRANDE RESOURCES, INC.; and ARRIBA COMPANY, LTD., an Oklahoma limited partnership, and its General Partner, GILBERT L. MORRIS,

Defendants.

Case No. 92-C-433-E

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiffs Fina Oil and Chemical Company, American Cometra, Inc. and Corexcal, Inc. and hereby dismiss their Complaint as against all Defendants named herein, with prejudice to the re-filing thereof, with each party to bear its own costs.

Respectfully submitted,

ELLER AND DETRICH
A Professional Corporation

By: _____
James C. Hodges, OBA #4254
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

ATTORNEYS FOR PLAINTIFFS
FINA OIL AND CHEMICAL COMPANY,
AMERICAN COMETRA, INC. and
COREXCAL, INC.

CERTIFICATE OF MAILING

I, James C. Hodges, do hereby certify that on the 11th day of August, 1992, I placed a true and correct copy of the above and foregoing Dismissal With Prejudice in the United States mail with proper postage thereon fully prepaid to:

Richard L. Harris, Esq.
SHORT, HARRIS, TURNER
DANIEL & McMAHAN
1924 South Utica
Suite 700
Tulsa, Oklahoma 74104-6512

James C. Hodges

4.JCH\FINA\DISMISSAL

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARILYN M. COLBERT,

Defendant.

Civil Action No. 91-C-948-E

DEFAULT JUDGMENT

This matter comes on for consideration this 11 day of August, 1992, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Marilyn M. Colbert, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Marilyn M. Colbert, was served with Summons and Complaint on July 6, 1992. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Marilyn M. Colbert, for the principal amount of $1,409.15, plus administrative charges in the amount of $87.00, plus accrued interest of $385.36 as of September 29, 1991, plus interest

thereafter at the rate of 7 percent per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 3.51 percent per annum until paid, plus costs of this action.

S/ JAMES O. ELLISON

United States District Judge

Submitted By:

KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
3900 United States Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103
(918)581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOROTHY DEWITTY, EMANUEL PALMER, SAM ALLEN, GERALD DAVIS, STEVEN HERRIN, LORRAINE HAYNES, DWAYNE JOHNSON, and SAM PARKER,	)	
Plaintiffs,	)	
vs.	)	Case No. CIV 92-C-692-B
PLEAS THOMPSON, CHARLES RUBLE, RENEE CROOK, ELLOUISE COCHRANE, JERRY JENNINGS, and ZETTIE WILLIAMS,	)	
Defendants.	)	

ORDER DISSOLVING TEMPORARY RESTRAINING ORDER

NOW on this 11th day of August, 1992, the Court finds that the Temporary Restraining Order entered in this case on August 3, 1992, should be, and hereby is dissolved, and is replaced by the Order entered this date appointing a Special Master in this case and setting forth other requirements deemed appropriate by the Court.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TRACY PIGUET, Plaintiff, vs. LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services, Defendant.	)	Case No. 89-C-1041-E

O R D E R

The Court has for consideration the Plaintiff's Motion for Attorney Fees pursuant to 28 U.S.C. Section 2412(b), i.e., the Equal Access to Justice Act, and the Court has found that said application, filed December 30, 1991, was timely filed pursuant to Gutierrez vs Sullivan, 953 F.2d 579 (10th Cir., 1992). Therefore, Plaintiff's application and motion for attorney fees under the Equal Access to Justice Act should be granted in the amount of $4,730.00 and court costs in the amount of $14.25. As this Court has issued an Order and Judgment awarding Plaintiff's attorney fees under 42 U.S.C. Section 406(B)(1), Plaintiff's attorney shall pay the lower of the two fees to the Plaintiff himself, pursuant to Weakley vs Bowen, 803 F.2d 575 (10th Cir., 1986).

It is therefore ORDERED that Plaintiff's counsel shall be awarded an Equal Access to Justice Act attorney fee in the amount of $4,730.00 and $14.25 in court costs.

ORDERED this 10 day of August, 1992.

S/ JAMES O. ELLISON

James O. Ellison, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN ELLISON,

Plaintiff,

vs.

COLONEL RAFAEL GONZALES, United States Army,

Defendant.

Case No. 89-C-711-B

ORDER

This matter comes on for consideration of Plaintiff's Second Application for Attorney's Fees and Legal Expenses. Costs and fees can be awarded under the Equal Access to Justice Act to a "prevailing party in any civil action brought by or against the United States" when application is made "within thirty days of final judgment in the action." 28 U.S.C. §§ 2412(b), (d)(1)(B). A final judgment, according to the Act, is one which is "final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G).

Plaintiff submits the present application after this Court's Order of April 9, 1992, dismissing his cause for failure to exhaust administrative remedies. That Order was subsequently appealed by Plaintiff to the Tenth Circuit. Hence the Order of April 9, 1992, is not an unappealable "final judgment" under § 2412, and Plaintiff's Application is DENIED, being premature.

IT IS SO ORDERED this 11th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

53.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOLLAR SYSTEMS, INC., a Delaware Corporation,

Plaintiff,

v.

OBSIDIAN LIVERY, INC., a Louisiana corporation, and LES MATTHEWS, an individual,

Defendants.

Case No. 92-C-574-B

DISMISSAL WITHOUT PREJUDICE

Plaintiff, Dollar Systems, Inc. ("Dollar"), hereby dismisses without prejudice the within action in its entirety.

W. Kyle Tresch

James L. Kincaid, OBA # 5021
Kathryn L. Taylor, OBA # 3079
W. Kyle Tresch, OBA #13789

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
Suite 500
321 South Boston
Tulsa, Oklahoma 74103-3313
(918) 592-9800

ATTORNEYS FOR DOLLAR SYSTEMS, INC.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 10th day of August, 1992, to:

Les Matthews
Obsidian Livery, Inc.
418 Common Street
New Orleans, LA 70130

W. Kyle Tresch

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAYME LEROY HAYES,

Plaintiff,

vs.

GARY D. MAYNARD, et al.,

Defendants.

No. 92-C-41-E

ORDER AND JUDGMENT

Comes now before the Court for its consideration Defendants' motion to dismiss Plaintiff's civil rights complaint pursuant to 42 U.S.C. §1983. Defendant moves for dismissal of said complaint on the grounds Plaintiff has failed to state a claim which would entitle him to relief. After review of the pleadings, the Magistrate Judge's Report and Recommendation and for good cause shown, Defendants' motion to dismiss should be granted.

The rule for reviewing the sufficiency of any complaint is that the "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In a §1983 cause of action, the Plaintiff must demonstrate that the conduct complained of was committed by a person acting under color of state law and that said conduct deprived Plaintiff of some right, privilege, or immunity under the constitution or laws of the United States. Gunkel v. City of Emporia, Kan., 835

F.2d 1302, 1303 (10th Cir. 1987).

The Court finds no supporting evidence to establish that Plaintiff has been deprived of any of the above-stated constitutional rights, privileges or immunities. Moreover, the particular grooming codes are reasonable related to legitimate penological interests. Turner v. Safley, 482 U.S. 78 (1987).

All inmates are to comply with said grooming code, so no racial discrimination is involved. Subjecting the inmates to a grooming code is not cruel and unusual punishment. Therefore, the code does not violate Plaintiff's civil rights and is "facially valid as a general penal regulation." Longstreth v. Maynard, 961 F.2d 895, 902 (10th Cir. 1992).

Accordingly, Plaintiff's Complaint does fail to state a claim upon which relief can be granted; Defendants' motion to dismiss is hereby granted.

So ORDERED this 10th day of ~~July~~ AUGUST, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

9175525P.ORDER

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES BEEF CORPORATION Plaintiff v. THE UNITED STATES OF AMERICA Defendant	)	Case No. 91-C-532-E

STIPULATION AND ORDER FOR DISMISSAL

The parties stipulate and agree that:

1) The complaint filed in this action shall be dismissed with prejudice;

2) Each party shall bear its own costs, including attorney's fees and other expenses of litigation.

Dated: Aug. 6, 1992

DOUGLAS FRAZER
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-9374

Attorney for Defendant

Dated: 8/10/92

RANDALL G. VAUGHAN
Pray, Walker, Jackman,
Williamson & Marlar
900 Oneok Plaza
Tulsa, Oklahoma 74103
Telephone: (918) 584-4136

Attorney for Plaintiff

SO ORDERED:

U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUIS WILLIAM BRINLEE, JR.,

Plaintiff,

v.

EMCASCO INSURANCE COMPANY,

Defendant.

No. 92 C-407 E

ORDER OF PARTIAL DISMISSAL WITHOUT PREJUDICE

NOW ON this 10 day of August, 1992, it appearing to the Court that the Plaintiff wishes to dismiss his claims of bad faith against the Defendant, said claims are herewith dismissed without prejudice. The Plaintiff's claim for uninsured motorist benefits remains.

S/ JAMES O. ELLISON

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ABATEMENT SYSTEMS, INC.,

Plaintiff,

v.

FIGGIE ACCEPTANCE CORPORATION,

Defendant.

No. 90-C-900-B

O R D E R

Before the Court are the motion to reconsider or in the alternative alter or amend judgment filed by the plaintiff, Abatement Systems, Inc. ("ASI"), and the motion to alter or amend judgment filed by the defendant, Figgie Acceptance Corporation ("Figgie"). The Court entered its Order and Judgment sustaining summary judgment in favor of Figgie on January 16, 1992.

In its motion, ASI requests the Court to reconsider the Court's Order of January 16, 1992 concerning ASI's claim that Figgie was equitably estopped to deny its contractual obligation on the set aside letter. ASI states that the language of the Court's ruling may prejudice ASI from presenting its claim of equitable subordination and estoppel to assert a prior lien in the bankruptcy proceeding.

The Court overrules ASI's motion to reconsider or alter or amend judgment. It is clear from the Order of January 16, 1992 that the Court's holding on ASI's contract claims does not preclude ASI from pursuing its claims in the bankruptcy proceeding, as the issues of equitable subordination and estoppel to assert a prior

lien were never presented to this Court. The resolution of these issues lies in the bankruptcy court.

In its motion, Figgie moves to amend the Court's judgment of January 16, 1992 to grant Figgie attorney fees. Figgie contends that it is entitled to attorney fees because it is the prevailing party in an action to recover for labor or services, pursuant to 12 O.S. §936.

ASI counters that this Court does not have jurisdiction to consider Figgie's Fed.R.Civ.P. 59 motion, because the motion was not served upon ASI's attorney within ten days as required by Rule 59(b). ASI also argues that this is not an action under 12 O.S. §936 to recover for labor or services, but rather an action to recover for the breach of contract to set aside funds for payment in case of default by 5000 Skelly Corporation.

The Court overrules Figgie's motion, concluding that the Court does not have jurisdiction to consider the motion as Figgie did not serve ASI's attorney within the ten day period required by Rule 59(b). Shults v. Henderson, 110 F.R.D. 102, 104 (W.D. N.Y. 1986); Bullard v. Estelle, 502 F.Supp. 887, 895 (N.D. Tex. 1980) (critical time is that of service, not of filing).[1]

IT IS SO ORDERED, this 7 day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1] The Court notes that even if the motion were timely filed, the action is not within the purview of 12 O.S. §936.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

COMMITTEE FOR THE FIRST AMENDMENT, an unincorporated association of students, faculty, and other members of the University community of Oklahoma State University, including the following individual members, et al.,

Plaintiffs,

vs.

JOHN R. CAMPBELL, individually and in his official capacity as President of Oklahoma State University, et al.,

Defendants.

Case No. 89-C-830-B

J U D G M E N T

In accordance with the Order entered herein on August 7, 1992, denying Plaintiffs' Motion For Summary Judgment on the issue of nominal damages and sustaining Defendants' Motion For Summary Judgment on the issue of qualified immunity, Judgment is hereby entered in favor of Defendants and against Plaintiffs. Relative thereto the parties shall pay their own respective costs and attorneys fees.

DATED this 7th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

COMMITTEE FOR THE FIRST AMENDMENT, an unincorporated association of students, faculty, and other members of the University community of Oklahoma State University, including the following individual members, et al.,

Plaintiffs,

vs.

JOHN R. CAMPBELL, individually and in his official capacity as President of Oklahoma State University, et al.,

Defendants.

Case No. 89-C-830-B

O R D E R

This matter comes on for consideration of Plaintiffs' and Defendants' cross-motions for summary judgment.

Plaintiffs brought this action seeking declaratory and injunctive relief, and later monetary relief in their Amended Complaint, against various defendants in response to a decision made by the Board of Regents of Oklahoma State University (OSU) to suspend the showing of *The Last Temptation of Christ*, a Martin Scorsese film based on the book of the same name. In the film Jesus is depicted as a carpenter who, after crucifixion, descends from the cross, marries Mary Magdalene (who dies in childbirth) and later marries her sister Martha. In the film Jesus fathers children,

returning at the end of his natural life to the anguish and torment of the cross. The film has been controversial.[1]

Plaintiffs filed this action, on October 5, 1989, seeking declaratory and injunctive relief for alleged violations of their civil rights under the First and Fourteenth Amendments of the Constitution of the United States. Plaintiffs are students, faculty members and other interested members of the university community at Oklahoma State University (OSU). Plaintiffs, alleging they were acting out of an interest in seeing the University remain, and promoted as, a free and unfettered forum for the presentation of a wide variety of free expression, ideas and concepts, brought this suit individually and as representatives of students, faculty members and other interested persons who wished to view the film "*The Last Temptation of Christ*", or have the opportunity to view the film on the campus of Oklahoma State University.

Defendants are members of the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges, and various officials with responsibility under Oklahoma law for the governing and control of OSU. Plaintiffs alleged Defendants opened and maintained a "limited public forum" by suspending, on or about September 22, 1989, the film's scheduled presentation on October 19, 20 and 21, 1989, until responses to a number of questions posed by the Regents were made. Plaintiffs allege Defendants thereby engaged in a form of "content based discrimination", and that

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[1] **Nayak v. MCA**, 911 F.2d 1082 (5th Cir.1990), *cert.den.* 111 S.Ct. 962 (1991).

causing cancellation of its presentation at the scheduled time amounted to "prior restraint", all in violation of the First Amendment of the Constitution of the United States.

Between September 22 and October 5, 1989, counsel for the respective parties had several telephone conversations relative to when the Board of Regents would again meet to make a final decision as to the showing of the film on the scheduled dates. Counsel for Defendants urged Plaintiffs' counsel not to file the action until the Board of Regents held its meeting, then unscheduled.

Plaintiffs Complaint asked the Court to "enter a judgment for damages on behalf of the Plaintiffs in the event that a delay from the original showing of the movie is occasioned by the actions of the Defendants."

On October 6, 1989, Plaintiffs' requested the issuance of an *ex parte* Temporary Restraining Order which was denied by this Court. The Court held a hearing on October 12, 1989, (a Thursday), which began at approximately 3:30 P.M. and lasted until approximately 9:30 P.M.. As the hearing concluded, the Court stated:

> "that before this Court intervenes and directs the Board of Regents of the Oklahoma State University how to run their business on this particular issue, I think wisdom would dictate to let them go forward with their special meeting tomorrow. And depending upon what their decision is between then and 9 o'clock on Monday morning, we'll take this matter back up on Monday morning."

The Board did meet on Friday, October 13, 1989, and decided to allow the film to be shown on the scheduled dates.

This Court, on October 16, 1989, held a telephonic hearing

with counsel and denied Plaintiffs' request for a preliminary injunction.

On October 19, 1989, Plaintiffs filed their First Amended Complaint seeking at least nominal damages for violation of their constitutional rights, a trial by jury after which the Court should enter a judgment for damages, and allow Plaintiffs attorneys fees and costs. Plaintiffs sought damages against all Defendants except Defendants Beer and Keys.

The film was shown as scheduled on October 19, 20 and 21. Thereafter the Court concluded that to continue the litigation beyond the showing of the subject film on the scheduled dates was to continue, in essence, a moot controversy. It therefore dismissed the case. [2] Plaintiffs appealed.

The Tenth Circuit opinion affirmed the District Court's summary judgment procedure[3] under an abuse of discretion standard,

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[2] The Court later concluded that Plaintiffs were entitled to an award of attorneys fees in the amount of $18,082.50 as prevailing parties because of some success gained in this matter. While dispute existed whether OSU Regents had or had not yet scheduled a meeting to make a final decision as to the showing or non-showing of "*Last Temptation of Christ*", the filing of this lawsuit on October 5, 1989, and the Court hearing on October 12, 1989, served, this Court concluded, as a salutary catalyst in the Regents' decision to allow the showing of the controversial film on the scheduled dates.

[3] The Tenth Circuit opinion noted the District Court viewed Defendants' motion for summary judgment on the grounds of mootness as the functional equivalent of a motion to dismiss for failure to state a claim under Rule 12(b)(6), F.R.Civ.P.. Such characterization, the Appellate Court noted, was incorrect because the district court apparently considered material outside the complaint and the amended complaint in deciding the mootness question (e.g. the preliminary injunction evidence).

holding that this Court's arguably improper denial of Plaintiffs' Rule 56(f) motion was "cured" by Plaintiffs' failure to satisfactorily explain (in their opposition pleadings) why facts precluding summary judgment could not be presented. This includes identifying the probable facts not available and what steps have been taken to obtain these facts, and how additional time will enable one to rebut a movant's allegations of no genuine issue of fact. The Tenth Circuit panel concluded that Plaintiffs' submission in opposition to summary judgment failed both independent requirements. The Tenth Circuit opinion also affirmed the District Court's denial of Plaintiffs' motion to reconsider under the same abuse of discretion standard.

Further, the Tenth Circuit panel considered, again under an abuse of discretion standard, whether the District Court erred in determining that Plaintiffs' request for injunctive relief was moot, especially in light of the newly adopted 1991 policy. In its opinion, the Tenth Circuit recognized that voluntary cessation of allegedly unlawful conduct does not necessarily make a case moot, unless defendants can establish no reasonable expectation of the wrong's recurrence, citing **United States v. W.T. Grant Co.**, 345 U.S. at 632-33. Noting that the latter is a heavy burden, the panel ruled that Plaintiffs, who had access to the 1991 policy, did not meet their burden with respect to "some cognizable danger of recurrent violations." The Tenth Circuit panel concluded that "[E]ven a cursory examination of the 1991 policy reflects major changes from the 1970 policy.", declining to remand the case for an

evidentiary hearing on whether Plaintiffs' request for injunctive relief is moot.

The Tenth Circuit reversed the case on the issue of Plaintiffs' claim for nominal damages, noting that "[n]either the showing of the film on the originally scheduled dates, nor the subsequent enactment of the 1991 policy erases the slate concerning the alleged First Amendment violations in connection with the film." The narrow issue on remand is:

> Because the district court granted summary judgment on all of Plaintiffs' claims for mootness, it did not resolve the qualified immunity issue. Although the parties have briefed the legal issue of qualified immunity on appeal, we decline to address the issue without the benefit of the district court's thoughts on the issue. On remand, the district court must first resolve Defendants' claim of qualified immunity.

The Tenth Circuit Court of Appeals noted that the Regents deferred the decision "on whether to allow the controversial film to be shown pending advice as to whether an on-campus showing could be prohibited on the grounds of (1) excessive entanglement between a state university and religion,[4] and (2) damage to the

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[4] The regents solicited this advice, in part, through a series of questions directed to the university president. Two such questions inquired:

"5. Prior to the Student Union Activities Board announcing a decision to show this particular film, was sufficient consideration given to the question of whether showing this film could possibly represent an "entanglement" with certain Constitutional provisions related to religion (i.e. separation of Church/State standards)?

10. Would denial or prohibition of showing the film in question impinge on certain rights guaranteed under the U.S. Constitution (this question should be weighed in consideration of the question pertaining to a possible "entanglement turning on other certain Constitutional provisions related to the separation of Church/State standards, and in ascertaining if there is a legitimate interest of

University's reputation due to offending a major segment of the Oklahoma Christian community. Plaintiffs have sought nominal damages from all defendants in their official capacities and all but two defendants (Beer and Keys) in their individual capacities. Since damage awards against defendants in their official capacities are barred by the Eleventh Amendment, **Will v. Michigan**, 491 U.S. 58, 71 (1989); **Kentucky v. Graham**, 473 U.S. 159, 169-170; **Seibert v. Univ. of Okla. Health Sciences Ctr.**, 867 F.2d 591, 594-95 (10th Cir.1989), the Court will only consider nominal damage claims against all defendants except Beer and Keys in their individual capacities.

Defendants are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." **Harlow v. Fitzgerald**, 457 U.S. 800, 818 (1982). It is a plaintiff's burden to convince a Court that the law is "clearly established". **Lutz v. Weld County School District No. 6**, 784 F.2d 340, 342-43 (10th Cir.1986).

One of the Defendants, Dr. Keys, Director of the OSU Student Union, testified:

> ". . . the only question I had in mind regarding that movie was a question of church-and-state entanglement but I was not qualified to make a judgment on that, that would have to be made by persons who were more qualified than I in the law regarding separation of church and state."

One of the Plaintiffs, Mendle E. Adams, United Ministry's

"neutrality" which should be protected by prohibiting the showing of the film?"

Chaplain on campus at OSU and an ordained minister for the United Church of Christ, testified that the theological discussion following the screening of the film should occur off-campus because "that was not appropriate to be done on campus".

The most important factor in Regent Carolyn Savage's mind concerning screening of the film was for it to be "the right decision . . ." . . . "one that can legally stand up . . .". Some of tne ten questions posed by the Board directly addressed the First Amendment conflicts question. Approximately a month passed from the time the controversy arose and the film was shown, on schedule.

The First Amendment embodies two sacrosanct rights, speech and religion. The two are not incapable of colliding. **Collins v. Chandler Unified School Dist.**, 644 F.2d 759 (9th Cir.1981). Interpreting the First Amendment is considerably more difficult than quoting it. **Mueller v. Allen**, 463 U.S. 388 (1983).

The position of Regent at a University or College carries with it sizeable responsibility. One functions not as a ceremonial figurehead but as the designated lawful governance of the university. **Rampey v. Allen**, 501 F.2d 1090 (10th Cir.1974); **Hand v. Matchett**, 957 F.2d 791 (10th Cir.1992). Given the climate of this half-century's politics and social issues, it is a position occasionally requiring the wisdom of Solomon. From a logistics viewpoint this wisdom is not always available instanter. Regents, appointed by the Governor of the State of Oklahoma, typically reside and carry on their vocations throughout the state as a

whole. They must be summoned, informed, collected and briefed on a given emergency matter.

Would not appropriate inquiry permit a timely preview of the subject film by the Regents or their designated representative to be apprised of its content?

On issues upon which some constitutional scholars might well disagree, should a reasonable constitutional inquiry by non-scholars regarding potential conflicts risk subjecting the imposition of damage awards, be they nominal or otherwise, upon conscientious officials in the academic arena? The Court is of the opinion it should not.

In **Roberts v. Madigan**, 921 F.2d 1047 (10th Cir 1990), the Court stated:

> "Over the years, the Supreme Court has developed a three-part test for determining the propriety of state action under the Establishment Clause as it applies to the states through the fourteenth amendment. First, state action must have a secular purpose. Second, the primary effect of any state action must be one that neither advances nor inhibits religion. Finally, state action must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed 2d 745 (1971). The first two criteria thus require that governmental action be neutral with respect to religion, both in purpose and primary effect.This requirement of government neutrality prohibits governmental action whose purpose or effect is to suppress religion as well as action that advances it."

Achieving neutrality while at the same time balancing the tension created by the free speech and establishment tenets of the First Amendment calls for considered judgment which does not lend itself to hasty decision. Timely but purposeful reflection is prudent.

"Reasonable people" can in good faith be diametrically opposed on many social, legal and human issues, the application of the First Amendment certainly being no exception. The Court is of the view that when the Defendants sought timely pertinent advice of legal counsel concerning the potential First Amendment conflicts herein they did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." **Harlow v. Fitzgerald**, 457 U.S. 800, 818 (1982).

The Court concludes Plaintiffs have failed to "clearly establish" such violation of statutory or constitutional rights on the part of these Defendants.

The Court concludes Plaintiffs' Motion For Summary Judgment, on the issue of nominal damages, should be and the same is hereby DENIED. The Court further concludes Defendants' Motion For Summary Judgment on the issue of qualified immunity of the Defendants should be and the same is hereby SUSTAINED.

IT IS SO ORDERED this 7th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANDREW A. SANDERS,

Plaintiff,

vs.

UNITED AMERICAN INSURANCE COMPANY,

Defendants.

Case No. 92-C-186-B

DISMISSAL WITH PREJUDICE

Andrew A. Sanders and his undersigned attorney of record do hereby dismiss the above-styled action and the claims stated therein with prejudice.

Andrew A. Sanders

Christopher R. Parks
Attorney for Andrew A. Sanders

00002JHS.Dis

CERTIFICATE OF SERVICE

I, Christopher R. Parks, do hereby certify that on the 7 day of August, 1992, a true and correct copy of the above and foregoing instrument was mail, postage prepaid thereon, to:

Jack H. Santee
320 South Boston, Suite 920
Tulsa, Oklahoma 74103

Christopher R. Parks

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

COY ARTHUR HILL,

Petitioner,

vs.

DAN REYNOLDS, et al.,

Respondents.

Case No. 90-C-845-B

O R D E R

Before the Court is Petitioner's objection to the Magistrate Judge's recommendation to deny Petitioner's request for a Writ of Habeas Corpus. Petitioner seeks habeas relief on two 1972 convictions, which he claims enhanced his current prison sentence.

Petitioner Coy Arthur Hill was arrested at age 17. He was tried as an adult and convicted of kidnapping and robbery on June 6, 1972, in Tulsa County District Court. He received two 15-year sentences to run concurrently, and has since served his time for those convictions.

Hill filed a petition for habeas relief on October 2, 1990, stating that the two 1972 convictions enhanced his current sentence. He contends that he was not certified to stand trial as an adult in the 1972 case, and that he was denied the right to appeal those convictions.

Title 10 O.S.1971 §1101 was in effect at the time of Hill's first convictions. The statute required certification hearings for females ages 16 to 18 before they could be tried as an adult, but

males age 16 and older could be tried as an adult without a certification hearing. In 1972, the Tenth Circuit ruled the statute unconstitutional, saying it violated the Equal Protection Clause of the 14th Amendment. Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972). The court in Radcliff v. Anderson, 509 F.2d 1093 (10th Cir. 1974), held that the Lamb ruling should be applied retroactively.

Hill filed an application for post-conviction relief in Tulsa County District Court on April 4, 1989, alleging he did not get a proper certification hearing. In his petition before the state court, Hill admitted he was taken to the Juvenile Division for a certification hearing, but stated that no material issues of fact were presented to the court, and there was no evidence offered that would support a finding of certification. Hill states that the hearing was terminated when the judge was told Hill's parents had been unable to attend.

Hill's application for post-conviction relief was denied on August 2, 1989. Tulsa District Court Judge B.R. Beasley stated that Juvenile Court records showed a certification hearing was held on April 20, 1972; therefore, Hill's claim was without merit. The Oklahoma Court of Criminal Appeals affirmed the denial on September 5, 1989.

In support of his claim, Hill submits the third page of a docket sheet for Tulsa County case No. CRF-79-1001. The photocopied page of the docket sheet states that, during a preliminary hearing held in June 1979, the judge "has stricken the second page of both charges, that being the former felony convictions of Coy Hill when

he was a juvenile. Coy Hill was never certified as an adult and both judgment and sentence were pronounced when he was seventeen."

The Court noted that the record was incomplete on the issue of whether Hill had a certification hearing; therefore, the parties were requested on June 22, 1992, to supplement the record. In addition, the Court held a telephone conference on July 7, 1992, to further investigate the issue. Finally, the Court ordered the parties on July 29, 1992, to again supplement the record with information on Hill's current sentence and what, if any, effect the juvenile convictions had on that sentence.

Upon review of the Transcript of Sentencing ("Transcript") and Judgment and Sentence in Case No. CRF-85-140 submitted by the parties in response to the Court's July 29 order, the Court concludes that the allegedly unconstitutional convictions do not affect Hill's sentence under 21 O.S.(1985) §51, the statute governing Hill's current sentence, which states that:

> Every person who, having been twice convicted of a felony offense, commits a third, or thereafter, felony offenses within 10 years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years. ...

The jury, when sentencing Hill in CRF-85-140, his current sentence, was told that Hill had five prior convictions, including the two juvenile cases in question. (Transcript at 345.13 to 347.9). Even if the juvenile cases were not considered during the sentencing phase, the three valid convictions were enough to place Hill under the purview of the statute.

In United States v. Tucker, 404 U.S. 443 (1972), the trial judge, when determining the prisoner's sentence for bank robbery, considered his three prior convictions, two of which later were determined to be invalid. The Supreme Court remanded the case for resentencing, stating that "if the trial judge ... had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding." Id. at 448.

Hill also points to Coleman v. State of Oklahoma, 760 P.2d 196 (Okla. Crim. App. 1988), in which the Court of Criminal Appeals reduced a prisoner's sentence because the trial court unknowingly had considered two invalid prior judgments for enhancement purposes. The court held that "there is a presumption, although a very tenuous one, that the proof of five prior convictions may have had an adverse effect on the jury in arguing" for the longer sentence. Id. at 197.

However, this case is distinguishable from both Tucker and Coleman. The jury that sentenced Hill was aware there was a question regarding the constitutionality of the juvenile convictions. The portion of the docket sheet in Tulsa County case CRF-79-1001 that stated Hill did not have a certification hearing was read to the jury before it considered the sentence (Transcript of Jury Trial, case CRF-85-140, at 365.15-.22) In addition, Hill's court-appointed attorney explained to the jury that "whenever you convict a juvenile, you have got [sic] certain statutorial

procedures to follow and if you do not follow it [sic] it is invalid. Coy Hill has never been certified as an adult. Both judgments were pronounced when he was 17." (Transcript at 348.18-.22). Here, unlike in Tucker and Coleman, the sentencing body was aware there may have been a problem with some of the convictions. The sentences were not meted out in ignorance of the potential invalidity of the juvenile convictions.

In addition, it must be noted that Tucker and Coleman deal with prior convictions that unquestionably were invalid; here, the record is at best ambiguous. There is a clear statement in the record, signed by Judge Griffin, that Hill had a certification hearing in case No. JFJ-72-215,[1] on April 20, 1972, although that hearing was called into question in subsequent state court proceedings and there is no supporting information to show on what evidence that decision was based.[2]

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[1]The case later was transferred to District Court and became cases CRF-71-2133 and CRF-71-2134.

[2]The Court notes that Hill very well may have lost the right to appeal this issue due to laches. The court in Allen v. Raines, 360 P.2d 949 (Okla. Crim. App. 1961) stated that:

> The right to relief by habeas corpus may be lost by laches, when the petition for habeas corpus is delayed for a period of time so long that the minds of the trial judge and court attendants become clouded by time and uncertain as to what happened or due to dislocation of witnesses, the grim hand of death and the loss of records, the rights sought to be asserted have become mere matters of speculation, based upon faulty recollection, or figments of imagination, if not out-right falsification.

Id. at 952 (citations omitted). The wisdom of the application of laches could not be more evident than in the case at bar. Judge Griffin, Judge Frank and Hill's former Public Defender Paul Brunton

Hill also alleges he was denied his right to appeal the convictions, citing only a copy of Tulsa District Judge Margaret Lamm's November 6, 1979, order appointing the state Appellate Public Defender to prosecute post-conviction relief on Hill's behalf. Since the record indicates Hill had a direct appeal before the Oklahoma Court of Criminal Appeals (Hill v. State, 511 P.2d 604 (Okla. Crim. App. 1973)), he apparently refers to an appeal for post-conviction relief based on failure to provide him with a certification hearing in the 1972 kidnapping and burglary convictions.

It appears from the record that a pro se appeal for post-conviction relief, based on failure to provide a certification hearing in the 1972 convictions, was filed April 4, 1989. That ruling was appealed to the state Court of Criminal Appeals on August 25, 1989, and was denied on September 5, 1989. Therefore, the Court concludes, any claim of a loss of a right to appeal was rendered moot by the subsequent pro se appeal in 1989.

For the reasons above stated, in conjunction with the fact that Petitioner had three prior valid felony convictions that support the 21 O.S. §51 sentence enhancement, the Magistrate Judge's recommendation to deny Petitioner's request for a Writ of Habeas Corpus is hereby SUSTAINED.

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have no recollection of the case. Prosecutor Cary Clark is deceased. The Attorney General's office has been unable to contact Griffin's court reporter Tom Moses.

IT IS SO ORDERED, this 7th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REESA POOLE, Individually and as next of kin of Nicole M. Hodgins, Deceased,

Plaintiffs,

vs.

DARRELL CAMPBELL and TREVA L. HUGHES,

Defendants.

No. 92-C-680-E

ORDER

The Court has reviewed the record herein and finding that this case is not properly venued in this Court hereby transfers the case to the United States District Court for the Western District of Oklahoma at Oklahoma City, Oklahoma.

ORDERED this 10th day of August, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. BRUCE C. BELL, a/k/a BRUCE COURTNEY BELL; LOIS R. BELL a/k/a LOIS RUBY BELL; BELLWOOD CORPORATION, a corporation; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 89-C-831-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 5th day of August, 1992, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Bruce C. Bell a/k/a Bruce Courtney Bell, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed by certified return receipt addressee restricted mail to Bruce C. Bell a/k/a Bruce Courtney Bell, 2615 North Cincinnati, Tulsa, Oklahoma 74106, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on October 29, 1990, in favor of the Plaintiff United

States of America, and against the Defendant, Bruce C. Bell a/k/a Bruce Courtney Bell, with interest and costs to date of sale is $9,758.74.

The Court further finds that the appraised value of the real property at the time of sale was $2,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered October 29, 1990, for the sum of $1,781.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on July 1, 1992.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Bruce C. Bell a/k/a Bruce Courtney Bell, as follows:

Principal Balance as of 10-29-90	$5,731.94
Interest	2,273.14
Late Charges to Date of Judgment	96.12
Appraisal by Agency	300.00
Management Broker Fees to Date of Sale	651.00
Abstracting	150.00
Publication Fees of Notice of Sale	303.34
Publication Fee of Order & Notice of Hrg.	28.20
Court Appraisers' Fees	225.00
TOTAL	$9,758.74
Less Credit of Appraised Value -	2,000.00
DEFICIENCY	$7,758.74

plus interest on said deficiency judgment at the legal rate of 3.51 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Bruce C. Bell a/k/a Bruce Courtney Bell, a deficiency judgment in the amount of $7,758.74, plus interest at the legal rate of 3.51 percent per annum on said deficiency judgment from date of judgment until paid.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

KBA/esr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEPHEN D. WILLIS,

Plaintiff,

v.

STANLEY GLANZ, E. McLAFLIN, and E. CLINE,

Defendants.

No. 91-C-842-B

JUDGMENT

In accordance with the Order of August 3, 1992 affirming the Report and Recommendation of the United States Magistrate Judge, the Court hereby enters judgment in favor of the defendants and against the plaintiff. Costs are assessed against the plaintiff, if timely applied for pursuant to Local Rule 6.

DATED, this 5th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

13

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARK DAVID DEMOSS,

Petitioner,

v.

RON CHAMPION, et al.,

Respondents.

92-C-660-E

ORDER

The Court having examined petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 finds as follows:

(1) That the petitioner is contesting his conviction in the Oklahoma County District Court, which is located within the territorial jurisdiction of the Western District of Oklahoma.

(2) That the petitioner demands his release from the custody imposed as a result of that conviction and as grounds therefore alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.

(3) In the furtherance of justice this case should be transferred to the United States District Court for the Western District of Oklahoma.

IT IS THEREFORE ORDERED:

(1) Pursuant to the authority contained in 28 U.S.C. § 2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the United States District Court for the Western District of Oklahoma for all further proceedings.[1]

[1] Title 28 U.S.C. § 2241(d) states: "Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court

(2) The Clerk of this Court shall mail a copy of this Order to the petitioner.

Dated this 7th day of August, 1992.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such application is filed in the exercise of discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination."

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LHD CONSTRUCTION COMPANY, INC., a Kansas corporation, Plaintiff,	)	
v.	)	No. 91-C-382-B
CITY OF TULSA, OKLAHOMA, a municipal corporation, Defendants.	)	

O R D E R

The Court has for decision the Motions for Summary Judgment pursuant to Fed.R.Civ.P. 56 filed by the Plaintiff, LHD Construction Company, Inc. ("LHD"), and the Defendant, City of Tulsa, Oklahoma ("Tulsa").

In this declaratory judgment action LHD seeks a declaration that it is not required to forfeit its $146,044.00 bid bond that it filed along with LHD's bid in the amount of $2,920,880.00 concerning Tulsa's sewage construction project referred to as the Oklahoma West Bank Interceptor, Project No. SA-83-20.

Tulsa declared Plaintiff the lowest bidder and sent copies of the construction contract to LHD. LHD executed the documents, affixed the required performance bonds issued by Desert Indemnity Corporation and returned the documents to the City of Tulsa.

Tulsa rejected Desert Indemnity Corporation as an acceptable performance bond company because it was not licensed in Oklahoma and approved by the Treasury Department. Desert Indemnity Corporation was also the surety company on the initial bid bond in the amount of $146,044.00.

LHD asserts that it was unaware Desert Indemnity Corporation was not licensed in Oklahoma and not on the Treasury Department's approved list. LHD asserts that Tulsa's rejection of Desert Indemnity Corporation as a proper bonding company estops Tulsa from denying LHD's bid is nonresponsive. LHD also asserts that Tulsa's attempt to award the contract to LHD was null and void because LHD's bid was nonresponsive.

LHD alleges it is entitled to withdraw its bid without penalty because of the bid mistake in submitting the Desert Indemnity Corporation on the bid bond. LHD further asserts that a mutual mistake was made in the belief that Desert Indemnity Corporation was an acceptable bonding company when in fact it was not, entitling LHD to equitable rescission.

In response, Tulsa denies Plaintiff's bid was nonresponsive, and if nonresponsive, Tulsa alleged it has the right to waive any defects or irregularities in the bid and contracting process. Tulsa states that the LHD bid bond was not subject to the same requirements as the contract performance bond. The City of Tulsa states that LHD's conduct and public policy considerations estop LHD from asserting its bid is nonresponsive. Finally, the City of Tulsa, by way of a counterclaim, asserts that LHD forfeited its bid bond and Tulsa is entitled to a judgment against LHD in the sum of $146,044.00.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The record reflects the material undisputed numerical facts are as follows:

1. Plaintiff LHD Construction Company, Inc. ("LHD") is a Kansas corporation with its principal place of business in Kansas City, Kansas. (Stipulation of Parties filed January 31, 1992, referred to herein as "Stipulations"-Paragraph 1).

2. Defendant City of Tulsa, Oklahoma ("Tulsa") is a municipal corporation operating and existing under the laws of the State of Oklahoma (Stipulations-Paragraph 2).

3. Tulsa published notice in the Tulsa Daily Business Journal commencing on May 2, 1990, that it would accept bids for Sewerage Improvements-Tulsa, Oklahoma-West Bank Interceptor-Sanitary Sewer Bond Project No. SA-83-20 ("Project").

(Stipulations-Paragraph 4).

4. Project was undertaken by Tulsa as a result of a federal administrative order requiring commencement of construction by August 19, 1990. (Affidavit of A.J. Hamlett, Jr.)

5. Holloway, Updike and Bellen/Black & Veatch ("Holloway") acted at all times relevant to this action as the consulting engineer for Tulsa on the Project. (Stipulations-Paragraph 5).

6. LHD obtained Project contract documents from Holloway to submit a bid for the Project and timely submitted to Tulsa its bid. (Stipulations-Paragraphs 6 and 8).

7. LHD's bid was accompanied by a bid bond executed by Desert Indemnity Corporation. (Stipulations-Paragraph 8).

8. At the time LHD submitted its bid, Desert Indemnity Corporation was not a surety licensed to do business in the State of Oklahoma and was not on the U. S. Treasury Department's list of sureties acceptable on federal bonds. (Stipulations-Paragraph 9).

9. The Project contract documents provided that the bid security requirement could be met by a certified or cashier's check or a bidder's surety bond, also described as a bid bond or bid guarantee. (Affidavit of A.J. Hamlett, Jr.; contract documents at Exhibit B in Stipulations).

10. The Project contract documents (Notice to Bidders, Instructions to Bidders, Proposal signed by LHD) provided for forfeiture of the bid security as liquidated damages if the bid was accepted, a contract awarded and the bidder failed, neglected, or refused to enter a contract and provide legally responsible

sureties for the maintenance, performance and statutory bonds within thirty days of the contract award. (Affidavit of A.J. Hamlett, Jr.; Exhibit B to Stipulations).

11. Prior to and at the time of receipt of LHD's bid for the Project, the City of Tulsa did not require that bid bonds be written on sureties licensed to do business in the State of Oklahoma or on the U. S. Department of Treasury's list of sureties acceptable on federal bonds, and, did not check beyond the face of the submitted bid bond. (Affidavit of A.J. Hamlett, Jr.).

12. LHD's bid in the amount of $2,920,880.00 was the low bid for the Project. (Stipulations-Paragraph 10; Affidavit of A.J. Hamlett, Jr.). The contract for the Project was awarded by the City of Tulsa through action taken by the Tulsa Metropolitan Utility Authority, a public trust of which Tulsa is the beneficiary, at the Authority's regularly scheduled meeting on June 13, 1990. The contract was awarded to LHD subject to LHD's furnishing all requisite bonds and insurance and executing the contract documents. (Affidavit of A.J. Hamlett, Jr).

13. By letter of June 14, 1990, Holloway provided copies of the contract forms and forms of bonds to LHD for execution and return. Holloway advised LHD by letter of July 5, 1990, that LHD was required to enter into a contract and furnish necessary bonds thirty days from June 13, 1990, and that failure to do so would risk forfeiture of the bid bond. (Stipulations-Paragraph 11 and Exhibit D).

14. LHD executed copies of the contract forms and returned them, together with bonds executed by Desert Indemnity Corporation. (Stipulations-Paragraph 12 and Exhibit B).

15. The contract executed and returned by LHD provides that LHD "has submitted to the City, in the manner and at the time specified, a sealed bid in accordance with the terms of this contract." (Stipulations-Exhibit B; Affidavit of A.J. Hamlett, Jr.).

16. Tulsa rejected Desert Indemnity Corporation as an acceptable bonding company for the statutory, maintenance and performance bonds because Desert Indemnity Corporation was not licensed to do business in the State of Oklahoma and was not on the U. S. Treasury Department's list of sureties acceptable for the Project. (Stipulations-Paragraph 13).

17. Prior to and at the time of receipt of LHD's bid for the Project, Tulsa did not require contractors to provide statutory, maintenance and performance bonds which were executed by the same surety who executed the optional bid bond. (Affidavit of A.J. Hamlett, Jr.).

18. Ongoing written and oral communications between Tulsa employees and representatives and LHD employees and representatives occurred from July 9, 1990, to the end of July, 1990. The substance of these communications related to Tulsa's demands for performance, statutory and maintenance bonds from a company licensed to do business in the State of Oklahoma and LHD's assurance that such bonds would be immediately forthcoming.

(Affidavit of A.J. Hamlett, Jr.).

19. By letter of July 19, 1990, LHD requested that it be allowed until July 27, 1990, to submit such bonds from a new bonding company registered in the State of Oklahoma. (Stipulations-Paragraph 14 and Exhibit E).

20. Tulsa agreed to an extension to July 27, 1990, at 5:00 p.m. (Stipulations-Paragraph 15 and Exhibit F) and advised LHD that if this deadline was not met, the contract award to LHD would be terminated and the contract would then be awarded to the next low bidder which was $602,870.00 higher than LHD's bid. (Affidavit of A.J. Hamlett, Jr.).

21. LHD advised Tulsa by letter of July 24, 1990, that Desert Indemnity Corporation was faxing a letter stating all the reinsurance companies that would be behind the bond. (Stipulations-Paragraph 16 and Exhibit G).

22. LHD advised Tulsa by letter of July 27, 1990, that Desert Indemnity Corporation had informed LHD that Travelers Continental Surety would sign the performance, statutory and maintenance bonds and they would be arriving in Tulsa on Monday afternoon; LHD further advised it realized that LHD had not met the deadline for the time extension and requested an additional one day extension. (Stipulations-Paragraph 17 and Exhibit H).

23. LHD never provided the performance, statutory and maintenance bonds required by the contract documents. LHD was advised by letter of July 31, 1990, that its bid bond was called. (Affidavit of A.J. Hamlett, Jr.).

24. On August 10, 1990, Tulsa's Mayor awarded the contract for the project to the next lowest responsible bidder, Sherwood Construction, whose bid was $3,523,750.00, and authorized legal action to collect LHD's bid security. (Stipulations-Paragraph 18; Affidavit of A.J. Hamlett, Jr.).

25. Pertinent provisions of the contract documents are as follows:

A. City of Tulsa Notice to Bidders, Exhibit B to the Parties' Stipulations filed January 31, 1992, p. NB1A-2

> "A Certified or Cashier's Check or Bidder's Surety Bond, in the sum of five percent (5%) of the amount of the Bid will be required from each Bidder, to be retained as liquidated damages in the event the successful Bidder fails, neglects, or refuses to enter into said contract for the construction of said public improvements for said project, and furnish the necessary bonds within the thirty (30) days from and after the date the award is made.
>
> * * *
>
> "The Bidder to whom a contract is awarded will be required to furnish public liability and workmen's compensation insurance; performance, statutory, and maintenance bonds acceptable to the City of Tulsa, in conformity with the requirements of the proposed contract documents. The performance, statutory, and maintenance bonds shall be for one hundred percent (100%) of the contract price."

B. Instructions to Bidders - pp. B-1, B-4

> "B-2. Bid Security. Each bid shall be accompanied by a cashier's check, a certified check, or bidder's bond, for five percent (5%) of the total amount bid.
>
> "The bid security shall be made payable without condition to the City of Tulsa, Oklahoma, hereinafter referred to as the City. The bid security may be retained by and shall

be forfeited to the City as liquidated damages if the bid is accepted and a contract based thereon is awarded and the bidder should fail to enter a contract in the form prescribed, with legally responsible sureties, within thirty (30) days after such award is made by the City."

"B-3. Return of Bid Security. The bid security of each unsuccessful bidder will be returned when his bid is rejected. The bid security of the bidder to whom the Contract is awarded will be returned when he executes a contract and files satisfactory bonds. The bid security of the second lowest responsible bidder may be retained for not to exceed sixty (60) days pending the execution of the contract and bonds by the successful bidder."

"B-4. Withdrawal of Bids. No bidder may withdraw his bid for sixty (60) days after the date and hour set for the opening. A bidder may withdraw his bid at any time prior to expiration of the period during which bids may be submitted by a written request signed in the same manner and by the same person who signed the Proposal."

* * *

"B-14. Bonds. The bidder to whom a contract is awarded will be required to furnish bonds as follows:

a. Performance Bond. A Performance Bond to the City in an amount equal to one hundred percent (100%) of the contract price.

b. Statutory Bond. A Statutory Bond to the State of Oklahoma in an amount equal to one hundred percent (100%) of the contract price.

c. Maintenance Bond. A Maintenance Bond to the City in an amount equal to one hundred percent (100%) of the contract price."

C. Supplemental Conditions - p. ORF-185, Exhibit 3 to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment filed March 4, 1992 - p. 14

"Bonds. All construction contracts require the following bonds:

a. All construction contracts require the following bonds:

(1) A BID GUARANTEE equivalent to 5 percent of the bid price.

(2) A PERFORMANCE BOND in an amount not less than 100 percent of the contract price.

(3) A PAYMENT BOND in an amount not less than 100 percent of the contract price.

(4) A MAINTENANCE BOND in an amount not less than 100 percent of the contract price.

b. Such bonds shall be executed by the contractor and a corporate bonding company licensed to transact such business in the state in which the work is to be performed and named on the current list of 'Surety Companies Acceptable on Federal Bonds,' as published in the Treasury Department Circular No. 570, which is published annually in the Federal Register on July 1.

c. The contractors and subcontractors shall comply with such bonding requirements as may be imposed by the recipient (e.g., maintenance bonds)."

(The City of Tulsa asserts that this section of the contract documents labelled ORF-185, consisting of pages 1 to 14, is referred to on page 1 as "Guidance." The City states that the ORF-185 provision applies to contract bonds as a result of the language in the Notice to Bidders regarding furnishing performance, statutory and maintenance bonds "in conformity with the requirements of the proposed contract documents." The City states there is no such reference concerning the bid security in either the Notice to Bidders or Instructions to Bidders. Thus, the City asserts the provision of the "Guidance" at ORF-185 has no application to bid bonds).

26. The purpose of the bid security (5% of the bid price) is to require the bidder to stand behind its bid. Once a contract is

entered into, the bid bond is no longer applicable and the contract performance bonds (100% of the contract price) endure throughout the project until ultimately completed and accepted, according to their terms.

27. The proposal of LHD (Exhibit 5 to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment, pp. P1A-1 to P1A-6) dated May 23, 1990, at page P1A-5, states:

> "Enclosed is a Bidder's security bond for five percent amount of bond (5%) the amount of which the City may retain or recover as liquidated damages in the event that the undersigned fails to enter into contract for the work covered by this Proposal, provided the Contract is awarded to the undersigned within thirty (30) days, unless the City by formal recorded action extends the period fifteen (15) days, or within ninety (90) days if Federal funds are utilized, from the date fixed for opening of bids and the undersigned fails to execute said Contract and furnish the required bonds and other requirements as called for in these Contract Documents within thirty (30) days after award of the contract."

28. LHD states it was unaware that the security bid bonding company and the performance bonding company, Desert Indemnity Corporation, was not properly qualified in Oklahoma. LHD states it simply relied upon Desert Indemnity Corporation to file the appropriate qualifying bonds.

29. At no time previous to awarding the contract to the second low bidder did LHD assert that its bid was nonconforming. LHD persisted, prior to the award of the contract, in stating that it would see to it that its performance, statutory and maintenance bonds would be made to qualify and conform to the requirements of the contract. LHD first asserted the right to rescind when this

case was filed. At no time herein has the City of Tulsa ever asserted that Plaintiff's bid security bond did not comply with contract requirements.

30. Paragraph B-5 of Instructions to Bidders (Exhibit 3 to Brief in Support of Defendant's Motion for Summary Judgment) states in pertinent part:

> ". . . The City shall have the right to waive any defects or irregularities in any bid received."

31. The City stood to gain $602,870.00 by holding LHD to its contractual bid.

It is fundamental that the principal, LHD herein, is independently liable on the bid security bond filed by LHD with its bid. Okla. Stat. tit. 15, §§ 379, 380, and 381 and C.J.S. Principal and Surety, § 181. The bid bond in pertinent part states:

> "KNOW ALL MEN BY THESE PRESENTS, that we LHD Construction Co., Inc., 4512 Speaker Road, Kansas City, Kansas 66106 as Principal, hereinafter called the Principal, and Desert Indemnity Corporation, 1220 South Alma School Road, Suite 201, Mesa, Arizona, a corporation duly organized under the laws of the State of Nevada as Surety, hereinafter called the Surety, are held and firmly bound unto The City of Tulsa, Oklahoma, as Obligee, hereinafter called the Obligee, in the sum of Five Percent of Bid Amount (5% of BID), for the payment of which sum well and truly to be made, the said Principal and the said Surety, bind ourselves, . . ."

The City asserts that the contract project documents do not require bid bonds to be executed by a surety licensed to transact business in Oklahoma and, further, neither does the Public

Competitive Bidding Act of 1974 in Okla. Stat. tit. 61. In U.S. Elevator Corp. v. City of Tulsa, 610 P.2d 791 (Okl. 1980), the court states a "Home Rule" city, like Tulsa, is not bound by the Public Competitive Bidding Act if the City's charter contains its own competitive bidding provisions. The City also points out that its amended charter and ordinances do not have a requirement that the bid bond surety be licensed to transact business in Oklahoma.

It is not necessary for the court to determine whether the bid bond surety company has to be licensed in Oklahoma. This is because even if such is a requirement of the contract documents, the City of Tulsa had the right to waive such a requirement and by its conduct clearly did so. A municipality has the right to waive irregularities and nonmaterial variances where it is in the public's interest to do so. Altshul v. Springfield, 48 Ohio App. 356, 193 N.E. 788 (Oh. App. 1933); Township of River Vale v. R.J. Longo Construction Co., Inc., 127 N.J. Super. 207, 316 A.2d 737 (N.J. Super. Ct. 1974); Shannon H. Holloway Construction Company, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, 674 S.W.2d 523 (Ky. App. 1983); Robinson Electrical Co., Inc. v. Dade County, 417 So.2d 1032 (Fla. App. 1982); and 64 Am.Jur.2d, Public Works and Contracts, §§ 59 and 62.

LHD made no effort to withdraw its bid or contend that it was nonconforming during the bidding process. Until time ran out, LHD persisted in promising to provide a qualifying surety regarding the construction bonds. It cannot belatedly now successfully contend its bid was nonconforming and thus subject to rescission. Okla.

Stat. tit. 15, § 235.

For the reasons stated herein, Defendant, City of Tulsa's motion for summary judgment is SUSTAINED and the Plaintiff, LHD Construction Company, Inc.'s motion for summary judgment is hereby OVERRULED. A separate Judgment in keeping with this order shall be filed contemporaneously herewith.

DATED this 6th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH MACASTLE JACKSON,

Plaintiff,

v.

RON CHAMPION, et al.,

Defendants.

No. 90-C-1012-B

O R D E R

Attached to the plaintiff's motion to alter or amend is the affidavit of the plaintiff, Joseph Macastle Jackson, in which the plaintiff attests that he has not been restored to the status quo as ordered by the Court in its Order of June 26, 1992. The Court views the affidavit as a motion to enforce injunctive relief. Plaintiff states that the defendants have failed to obey the Court's Order by not restoring his level 4 status pursuant to 57 O.S. 138, his prison job and pay grade, lost wages, lost property and postage.

In its Order of June 26, 1992, the Court ordered "the defendants to restore Jackson to status quo prior to the exemption hearing by purging the disciplinary actions noted above[1] from his

[1] The disciplinary actions which the parties agreed were taken against the plaintiff for his failure to shave his beard are as follows:

4/19/91 Disobedience to Orders - refused to shave. 15 days DU, $10.00 fine;

5/1/91 Disobedience to Orders - refused to shave. 30 days DU, Loss of 30 earned credits, $15.00 fine;

5/7/91 Disobedience to Orders - refused to shave. 15 days DU, $10.00 fine;

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record, refunding the amount of fines paid, and crediting the number of earned credits lost as a result of his failure to comply with the grooming code. The Court further instructs the defendants to return Jackson to the medium security facility at DCCC." This is the sum and substance of the Court's grant of injunctive relief to the plaintiff and the defendants are to comply with this mandate.

It is, however, apparent to the Court that the plaintiff in his recent affidavit is attempting to raise additional denials allegedly effected by his nonconformance to the inmate grooming code. In its Order of May 5, 1992, the Court directed the parties to supplement the record with a list of "disciplinary actions taken against the plaintiff since his incarceration" and the parties did so. The Court fashioned its injunctive relief based on this agreed record. Plaintiff is not now permitted to raise belatedly other alleged denials.

In light of the above, the Court, therefore, directs the defendants to advise in writing specifically what has been done to show compliance with the Court's Order of June 26, 1992 on or

---

5/9/91	Disobedience to Orders - refused to shave. 30 days DU, $15.00 fine;
5/13/91	Disobedience to Orders - refused to shave. 30 days DU, $15.00 fine;
5/15/91	Disobedience to Orders - refused to shave. 30 days DU, $15.00 fine;
5/17/91	Disobedience to Orders - refused to shave. 30 days DU, $15.00 fine;
5/21/91	Disobedience to Orders - refused to shave. 30 days DU, $15.00 fine;
5/23/91	Disobedience to Orders - refused to shave. 30 days DU.
5/27/91	Disobedience to Orders - refused to shave. 30 days DU, Loss of 30 earned credits.
5/30/91	Disobedience to Orders - refused to shave. 30 days DU.
6/12/91	Transferred to Oklahoma State Penitentiary.

before August 14, 1992.

IT IS SO ORDERED, this 6th day of August, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH MACASTLE JACKSON,

Plaintiff,

v.

RON CHAMPION, et al.,

Defendants.

No. 90-C-1012-B

O R D E R

Before the Court is the plaintiff's Motion to Alter or Amend Pursuant to Fed.R.Civ.P. 54(b) and/or 28 U.S.C. 1651. The purpose of plaintiff's motion is unclear to the Court. The Court entered a Judgment of June 26, 1992 in favor of the plaintiff on his claim of violation of his constitutional rights under the First and Fourteenth Amendments, and in favor of the defendants on their defense of qualified immunity. The plaintiff filed his notice of appeal of the Order and Judgment on July 9, 1992. As the Judgment as entered is a final judgment, disposing of all plaintiff's claims, and said judgment has been appealed, the Court denies plaintiff's motion. This matter is now within the jurisdiction of the Tenth Circuit Court of Appeals.

DATED, this 6th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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9175525P.ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BROOK D. and SWANNIE Z. TARBEL.)
)
Plaintiffs,)
)
v.) Case No. 91 C 164 E
)
UNITED STATES OF AMERICA,)
)
Defendant.)

FILED
AUG 5 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STIPULATION AND ORDER FOR DISMISSAL

The parties stipulate and agree that:

1) The complaint filed in this action shall be dismissed with prejudice;

2) Each party shall bear its own costs, including attorney's fees and other expenses of litigation.

Dated: 6/25/92

DOUGLAS FRAZER
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-9374

Attorney for Defendant

Dated: 7/13/92

B. John Eagleton, Esquire
Thomas G. Potts, Esquire
320 South Boston, Suite 700
Tulsa, Oklahoma 74103
(918) 583-2131

Attorneys for Plaintiffs

FILED
AUG 7 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

SO ORDERED:

U.S. DISTRICT JUDGE

ENTERED ON DOCKET
AUG 7 1992
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LHD CONSTRUCTION COMPANY, INC., a Kansas corporation, Plaintiff,	)	
v.	)	No. 91-C-382-B
CITY OF TULSA, OKLAHOMA, a municipal corporation, Defendants.	)	

J U D G M E N T

In accordance with the Order sustaining the Defendant's motion for summary judgment filed herewith, Judgment is hereby entered in favor of the Defendant, City of Tulsa, Oklahoma, a municipal corporation, and against the Plaintiff, LHD Construction Company, Inc., a Kansas corporation, in the amount of One Hundred Forty-Six Thousand Forty Four Dollars ($146,044.00), as liquidated damages for forfeiture of the bid bond on Oklahoma-West Bank Interceptor-Sanitary Sewer Bond Project No. SA-83-20; plus interest at the rate of 3.51% per annum from the date hereon. Costs are also assessed against the Plaintiff if timely applied for pursuant to Local Rule 6. The parties are to pay their own respective attorney fees.

DATED this 6th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK GRAVES,

Plaintiff,

vs.

SHONEY'S, INC., a Tennessee Corporation d/b/a Captain D's RESTAURANT

Defendant.

Case No. 91-C-709-B

JUDGMENT AS TO PLAINTIFF'S SECOND CLAIM FOR RELIEF

It appearing to the court that the defendant made an offer of judgment in the amount of Seven Thousand Five Hundred Dollars ($7,500), inclusive of attorneys fees and accrued costs for the alleged violation of 40 OK. Stat. § 165.1 et seq. as asserted in plaintiff's second claim for relief, that that offer of judgment was later amended, and that the amended offer was accepted by the plaintiff, and it further appearing to the court that judgment should be entered on the second claim for relief pursuant to the terms of the amended offer of judgment,

IT IS ORDERED pursuant to Rules 68 and 54(b) of the Federal Rules of Civil Procedure that the plaintiff shall recover a judgment against Shoney's, Inc., in the amount of $7,500, inclusive of attorneys fees and costs, on the second claim for relief as asserted by plaintiff in his amended complaint.

IT IS ORDERED FURTHER that the defendant's offer of judgment was made as an offer of settlement, without the defendant

withdrawing its answer to the amended complaint, specifically denying that it acted maliciously or with malice and without the defendant admitting any allegations in the amended complaint which were not admitted in its answer to the amended complaint.

IT IS ORDERED FURTHER that entry of this judgment is a partial adjudication of plaintiff's claims, and is entered without prejudice to the plaintiffs right to proceed on his first claim for relief for malicious prosecution.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Approved for Entry:

Matthew J. Sweeney, III
FARRIS, WARFIELD & KANADAY
Nineteenth Floor
Third National Financial Center
424 Church Street
Nashville, Tennessee 37219
(615) 244-5200

Attorney for Defendant

Steven E. Holden
BEST, SHARP, HOLDEN,
SHERIDAN & STRITZKE
Suite 808
Oneok Plaza
100 West 5th Street
Tulsa, Oklahoma 74103

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed first class, postage prepaid to Dennis King, KNOWLES, KING & SMITH, 603 Expressway Tower, 2431 East 51st Street, Tulsa, Oklahoma, 74105, and James Keeley, 1400 South Boston Building, Suite 68, Tulsa, Oklahoma, 74119, this 29TH day of July, 1992.

Matthew J. Sweeney III

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES EDWARD CUNNIGAN,

Plaintiff,

v.

RON CHAMPION, Warden and OFFICER DON KENT,

Defendants.

91-C-873-B

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed April 2, 1992, in which the Magistrate Judge recommended that Defendants' Motion to Dismiss be granted. Although plaintiff sought an extension of time in which to file objections to the Report and Recommendation, no exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that Defendants' Motion to Dismiss is granted.

Dated this 6th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITES STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BANK OF OKLAHOMA, NATIONAL ASSOCIATION, a national banking association, IN ITS CAPACITY AS TRUSTEE OF THE PAYNE COUNTY HOME FINANCE AUTHORITY SINGLE FAMILY REVENUE BONDS 1980 SERIES A,

Plaintiff,

vs.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, a Connecticut corporation,

Defendant.

Case No. 92-C-349-E

JOINT DISMISSAL WITH PREJUDICE

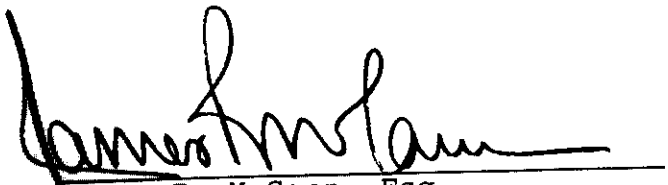
Plaintiff, Bank of Oklahoma, National Association, and Defendant National Fire Insurance Company of Hartford, a corporation, hereby dismiss all claims in the captioned matter with prejudice.

Respectfully submitted,

ROBINSON, LEWIS, ORBISON,
SMITH & COYLE

By _____
Kenneth M. Smith, OBA #8374
Beverly A. Stewart, OBA #13357
P. O. Box 1046
Tulsa, Oklahoma 74101
(918) 583-1232

ATTORNEYS FOR PLAINTIFF, BANK OF OKLAHOMA, NATIONAL ASSOCIATION



James P. McCann, Esq.
L. Dru McQueen, Esq.
DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON
320 South Boston, Suite 500
Tulsa, Oklahoma 74103

ATTORNEYS FOR NATIONAL FIRE
INSURANCE COMPANY OF HARTFORD

228Meis-JDWP

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FIRST FINANCIAL INSURANCE COMPANY,)
)
Plaintiff,)
)
v.) 91-C-867-B
)
MAXIMILIANO, INC., d/b/a EVE'S)
PLACE; HARRY BROTTON; EVE LUCERO;)
and TIM LEBLANC,)
)
Defendants.)

ORDER

This order pertains to plaintiff's Motion for Summary Judgment (Docket #7)[1], defendants Maximiliano, Inc., d/b/a Eve's Place, Harry Brotton, and Eve Lucero's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment (#9), and Plaintiff's Response Brief to Defendants' Cross-Motion for Summary Judgment (#11).

Plaintiff seeks a declaratory judgment to determine the rights, obligations, and liabilities which exist between the parties to a policy of liability insurance issued on June 16, 1990.

The undisputed facts are that on August 5, 1990, Tim Leblanc, while patronizing a bar known as "Eve's Place", was struck in the head with a glass pitcher full of beer by Ted Holladay, another patron. As a result, Leblanc sustained injuries to his head and lost the sight in his right eye. On May 1, 1991, Leblanc filed an action in the District Court

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

of McIntosh County, Oklahoma, against Harry Brotton, owner of "Eve's Place", and Eve Lucero, manager of "Eve's Place". In his state court petition, Leblanc alleged that his injuries were a result of the defendants' negligence. Leblanc later amended his petition to include an allegation against Ted Holladay for assault and battery.

On November 6, 1991, First Financial Insurance Company ("FFIC"), the provider of liability insurance for "Eve's Place", filed this action against Maximiliano, Inc. d/b/a Eve's Place, Harry Brotton, Eve Lucero, and Tim Leblanc. FFIC asserts that it has no liability to the defendants under the policy issued to Maximiliano, Inc. because of an assault and battery exclusion.[2] Defendants contend that, in spite of the assault and battery exclusion, FFIC is liable for any monetary damages awarded against them as a result of the state suit, because the allegations are based on negligence, not assault and battery.

"[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts

[2] This exclusion reads as follows: "It is agreed and understood that this insurance does not apply to bodily injury or property damage arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person".

showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

An insurance policy should be construed according to its terms unless the terms are ambiguous. Frank v. Allstate Insurance Company, 727 P.2d 577, 579-80 (Okla. 1971). Where the terms are ambiguous, doubtful, or uncertain as to their meaning, the insurance contract must be construed liberally in favor of the insured and strictly against the insurer. An-Son Corp. v. Holland-America Insurance Company, 767 F.2d 700, 703 (10th Cir. 1985). See Continental Casualty Co. v. Beaty, 455 P.2d 684, 688 (Okla. 1969). If words of exclusion in an insurance policy are ambiguous, doubtful, or uncertain, they are to be viewed narrowly. An-Son Corp., 767 F.2d at 703. See Conner v. Transamerica Insurance Co., 496 P.2d 770, 774 (Okla. 1972). Furthermore, the burden of proving that a case falls

within the exclusionary clause of an insurance policy is placed on the insurer. Milliken v. Fidelity and Casualty Company of New York, 338 F.2d 35 (10th Cir. 1964).

An insurer does not have a duty to defend its insured if it can establish that the facts are such that the situation is not covered by the policy. Allstate Insurance Company v. Thomas, 684 F.Supp. 1056, 1058 (W.D.Okla. 1988). However, the insurer does have a duty to defend its insured if the allegations could arguably come within the policy's terms. Id.

Similarly, the Tenth Circuit has ruled that an insurer's duty to its insured is determined at the beginning of the litigation by comparing the terms of the policy with the allegations in the complaint. Milliken v. Fidelity and Casualty Company of New York, 338 F.2d 35, 40 (10th Cir. 1964). However, the court recognizes the possibility that an insurer's duty to defend might not attach until a later stage of the litigation due to discovery and other pretrial procedures. Id. Under the federal system of notice pleading, "the dimensions of a lawsuit are not determined by the pleadings because the pleadings are not a rigid and unchangeable blueprint of the rights of the parties". Id.

Neither the Tenth Circuit nor Oklahoma has ever considered the effect that an assault and battery exclusion has on an allegation of negligence against one defendant when that allegation is accompanied by an allegation of assault and battery against another defendant. However, the United States District Court for the Western District of Oklahoma has considered the effect that an intentional act exclusion has when the petition only pleads negligence. Home Indemnity Company v. Lively, 353 F.Supp. 1191 (W.D.Okla. 1972). In Lively, the insured threw a bottle at the plaintiff. Plaintiff was struck on the

head and, as a result, suffered a skull fracture and other related injuries. The insurance companies argued that the act of throwing the bottle was an intentional act, and therefore they had no duty to defend against the negligence allegation. Id. at 1193. The court found that the state court petition pled only negligence and did not allege any intentional act. Id. at 1195. Therefore, the insurers were obligated to provide the insured with a defense since there were no allegations as to an intentional act. Id.

Although Lively dealt with exclusionary clauses in insurance policies, this court feels it is distinguishable from the instant case. Lively dealt only with the effects of an exclusionary clause for intentional acts. In the instant case, we are concerned with the effects an assault and battery exclusion has on an allegation of negligence that arises from an assault and battery.

A number of federal circuits and state courts have dealt with this issue. In United National Insurance Company v. Entertainment Group Incorporated, 945 F.2d 210, 214 (7th Cir. 1991), the court concluded that, where plaintiff's "injuries originated in, or arose from, an assault and rape", the insurer had no duty to defend their insured because the insurance policy's assault and battery exclusion[3] precluded suits where there are allegations of assault and battery or allegations of negligence that have arisen due to assault and battery. In United, the insured argued that an assault and battery exclusion applies only when a suit

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[3] This exclusion read as follows:

. . .

5. *Assault & Battery Exclusion*
Claims arising out of an assault and/or battery, whether caused by or at the instigation of, or at the direction of, or omission by, the Insured, and/or his employees.

7. *Sexual Molestation Exclusion*
To bodily injury arising out of alleged and/or actual 'sexual abuse' of or 'sexual molestation' of a person not having attained the age of sixteen (16) years. The terms 'sexual abuse' and 'sexual molestation' include, but are not limited to physical sex acts, nudity, touching, assault and battery.

specifically alleges assault and battery as a cause of action. Id. at 213. They further argued that Doe had only pled negligence, and therefore the assault and battery as a exclusion did not apply. Id. The court found that the "plain language of this exclusion precludes coverage for a suit alleging that the insured's negligence caused the assault and battery". Id.

Similarly, in Essex Insurance Company v. Yi, 1992 WL 117366 (N.D.Cal.), the court found that an assault and battery exclusion released the insurer from its duty to defend or indemnify the Yis in an underlying state suit. In the underlying state suit two causes of action were named: general negligence and intentional tort. The court found that the language of this exclusion, which is identical to the language of the exclusion in the instant case, plainly precluded coverage for a suit alleging that the insured's negligence caused the assault and battery.

In Stiglich v. Essex Insurance, 721 F.Supp. 1386, 1387 (D.D.C. 1989), a dance club was sued for negligently failing to hire enough security personnel to prevent an assault and battery. The dance club argued that the suit was one of negligence and did not fall into the insurance policy's assault and battery exclusion clause.[4] Id. at 1388. The court held that the policy clearly excluded "bodily injury or property damage arising out of assault and battery *or out of any act or omission in connection with the prevention or suppression of such acts*." Id.

[4] This clause read as follows: "It is agreed that the insurance does not apply to bodily injury or property damage arising out of the assault and battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured."

If the claim made in the petition does not indicate that there is an underlying assault and battery, then the insurer must defend its insured until "such time as the claim is confined to a recovery that the policy does not cover." Terra Nova Insurance Co. v. 900 Bar, Inc., 887 F.2d 1213, 1226 (3rd Cir. 1989). In Terra Nova, an employee of the bar allegedly fired a gun, wounding two customers. One of the customers filed suit alleging negligence and intentional infliction of serious bodily harm. The second customer alleged negligence and assault and battery. The 900 Bar's insurance policy contained an assault and battery exclusion.[5] The insurer, Terry Nova, argued that it had no duty to defend the insured from suits that allege damages from assault and battery or damages that arise from an assault and battery. The court rejected Terra Nova's arguments on the ground that the state court pleadings alleged theories that were broad enough to cover a scenario that did not include assault and battery. Id. at 1226.

In this case, the language of the assault and battery exclusion plainly precludes coverage for a suit alleging that the insured's negligence caused the assault and battery. The court is particularly influenced by the language "out of any act or omission in connection with the prevention or suppression of such acts", which indicates that the exclusion applies to charges of negligence arising from assault and batteries.

Plaintiff's Motion for Summary Judgment is granted and Defendants' Maximiliano, Inc., d/b/a Eve's Place, Harry Brotton, and Eve Lucero's Cross-Motion for Summary Judgment is denied.

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[5] This exclusion read as follows: "It is hereby understood and agreed that no coverage shall apply under the policy for any claim, demand or suit based on assault and battery, and assault and battery shall not be deemed an accident, whether or not committed by or at the direction of the insured."

Dated this 5th day of August, 1992.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BLUE CIRCLE CEMENT, INC.,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ROGERS,

Defendant.

No. 91-C-635-E

ORDER AND JUDGMENT

This matter was set for bench trial on the 3rd day of August, 1992. Because the Court finds that the dispositive facts are uncontested and the legal issues are in a posture for resolution, the Court has stricken the matter from its docket and now rules on the merits.

The following material facts are undisputed. Plaintiff Blue Circle Cement, Inc. ("Blue Circle") is an Alabama corporation doing business in Rogers County, Oklahoma, as a cement manufacturer. The Defendant Board of Commissioners ("Board") is the duly constituted authority which enacts zoning ordinances within the County of Rogers. This dispute arose when it was learned that Blue Circle had contracted with a third party to receive, to store and to burn certain Hazardous Waste Fuels ("HWFs") in its cement kilns. The HWFs will thus be employed as a substitute fuel for the cement manufacturing process. Blue Circle asserts that the impetus for the arrangement was an attempt to reduce the cost of fuel at the cement facility, ... indeed, Blue Circle concedes that it anticipates receiving a tidy profit from the HWF incineration-as-

fuel arrangement (see Transcript of Pre-Trial Conference held June 23, 1992). The Board initially took the position that the incineration of HWFs in Blue Circle's kilns would convert Blue Circle's facility to "an industrial disposal site" within the meaning of Section 3.13.2 of the City of Claremore, Rogers County Metropolitan Planning Commission Zoning Ordinance. Blue Circle then filed this suit seeking declaratory relief on the issue of whether Section 3.13.2 does apply to its anticipated activities. Blue Circle strenuously argued that the incineration of HWF is deemed a form of recycling under state and federal law "because the hazardous wastes are used for a beneficial purpose, i.e., as a replacement fuel for coal, natural gas or petroleum." (see Pre-Trial Order at 2). As a recycling operation, Plaintiff argued, the plan to incinerate HWFs did not come within the purview of Section 3.13.2, because it would not constitute controlled industrial waste disposal. (Section 3.13.2 appears in its entirety as an attachment hereto as Exhibit "A").

Subsequently, on December 2, 1991, the Board amended Section 3.13.2 to expressly cover activities characterized as "recycling" of industrial waste. In all other respects the Ordinance remains the same, mandating - inter alia - that a covered site shall not be located within one mile of any platted residential subdivision.[1]

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[1]On August 21, 1991, Blue Circle applied to the Environmental Protection Agency (EPA) for "interim status" pursuant to Subsection 3005(e)(1)(A); 42 U.S.C. §6925(e)(1)(A); of the Resource Conservation and Recovery Act (RCRA). Section 6925(a) requires permits for the treatment, storage or disposal of hazardous waste and would apply to the existing cement kilns and to the storage facilities that Blue Circle planned to construct in connection with

The case raises several issues of law which will be considered ad seriatim:

1. Is the Ordinance, Section 3.13.2, either in its original or in its amended form of no force or effect because it is pre-empted by state and federal law; or
2. If pre-emption does not apply, is the Ordinance unconstitutional because it runs afoul of the Commerce Clause by discriminating against out-of-state interests; or
3. If the Ordinance does not violate the Commerce Clause is the ordinance, in its original form, inapplicable to the incineration activity contemplated by Blue Circle because incineration of HWFs is a recycling operation, not disposal; and
4. Is the Ordinance, as amended, inapplicable to the contemplated HWF incineration because retroactive application of the ordinance is precluded; or
5. Even if the amended ordinance does apply, should Blue Circle's investment in the plan be considered a vested interest so as to exempt it from the ordinance's provisions.

I. Pre-Emption

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the HWF incineration agreement. Blue Circle sought interim status under Section (e)(1)(A) which would allow it to be treated as if it had been issued a permit for a specified term. By letter dated May 22, 1992, the EPA denied the Application (Exhibit "B"). The letter indicates that one basis for EPA's decision was the failure of Blue Circle to obtain Board approval of the plan pursuant to Rogers County zoning ordinances.

Our federal pre-emption doctrine is well-established. It is elementary that Congress may pre-empt state and local authority within an area of the law by an express statement. See, e.g., City of Chesapeake v. Sutton Enterprises, Inc., 138 F.R.D. 468, 475 (E.D. Va. 1990); citing Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203, 103 S.Ct., 1713, 1722, 75 L.Ed.2d 752 (1983), citing Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Where Congress does not pre-empt an area of law expressly, it can be inferred that Congress intended to do so because 1) federal regulation "is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation ... [or, 2)] ... the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Hillsborough County, Fla. v. Auto. Med. Labs, 471 U.S. 707, 712, 105 S.Ct. 2371, 2374, 85 L.Ed.2d 714 (1985), (citations omitted). In Hillsborough, an operator of a blood plasma center challenged the constitutionality of certain local ordinances on the grounds that Food and Drug Administration (FDA) regulations promulgated pursuant to §351 of the Public Health Service Act had pre-empted the field. But the Supreme Court held that the ordinances were not pre-empted by federal law. It is worth noting that Justice Marshall, writing for a unanimous Court declared that because the intent of Congress is the dispositive issue, neither comprehensiveness of the federal scheme nor federal interest in the

area alone will compel a finding of pre-emption. Id., 471 U.S. at 714. Indeed, "'where ... the field that Congress is said to have pre-empted has been traditionally occupied by the states we start with the assumption that the historic police powers of the states "were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress".'" Id., 471 U.S. at 714, quoting Jones v. Roth Packing Co., 430 U.S. at 525, quoting Rice v. Santa Fe Elevator Corp., 331 U.S. at 230. The Court concluded that, given the FDA's statement that its regulations were not intended to pre-empt the field, taken in conjunction with the deference due the ordinances as exercises of traditional police powers, the Court could not infer pre-emption. Id. 471 U.S. at 715. Finally, even where federal regulation is not so comprehensive as to have displaced state and local regulation, states and localities are precluded from instituting schemes which conflict with federal regulation and to that extent, therefore, they are pre-empted. Id. 471 U.S. at 712. In sum, pre-emption occurs in any one of the three scenarios: 1) express Congressional intent; 2) an inference of Congressional intent where no room is left for supplementary regulation at the state or local level; 3) state or local laws which conflict with federal law, its purpose and objectives.

In the instant case, Blue Circle has argued that the Ordinance at issue, Section 3.13.2, is pre-empted by federal hazardous waste management law. At the federal level, hazardous waste is regulated under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.

§§6901 et seq.[2] RCRA provides that "[n]othing in this chapter shall be construed to prohibit any state or political subdivision thereof from imposing any requirements including those for site selection which are more stringent than those imposed by [the] regulations [promulgated pursuant to this chapter]." 42 U.S.C. §6929. Clearly, then, a pre-emption argument premised upon the first scenario (express statement by Congress of intent to pre-empt) must fail. Similarly, given the §6929 express statement of no pre-emption, coupled with the deference due this ordinance as an exercise of traditional local police power, the pre-emption argument must fail as to the second scenario. Does the ordinance, then, present an obstacle to RCRA, its purpose or objectives, so that it is pre-empted under the third scenario?

In 1986, the Eighth Circuit found that an ordinance which totally banned any storage, treatment or disposal of hazardous waste within the boundaries of Union County, Arkansas, was pre-empted by RCRA and its companion state statute - the Arkansas Hazardous Waste Management Act of 1979. Ensco, Inc. v. Dumas, 807 F.2d 743, 745 (8th Cir. 1986). The total ban, said the Circuit, operated as an obstacle to the purposes and objectives of RCRA. "The RCRA emphasizes the need for safe disposal and treatment of hazardous waste and grants to the EPA the authority to develop and detail appropriate waste procedures and to outlaw less healthful practices." Id. The ordinance in the instant case is clearly

[2]At the state level, the applicable statute is the Oklahoma Controlled Industrial Waste Disposal Act and is found at 63 O.S.A. §1-2001 et seq.

distinguishable. It does not prohibit disposal of hazardous waste but rather provides a permit scheme (as does RCRA and its Oklahoma counterpart) for disposal (and, under the amendment, recycling). The permit scheme requires, among other things, a one-mile corridor between residential areas and disposal sites. This can surely be viewed as a permissible "good faith adaptation of federal policy to local conditions." Id. The Court therefore finds that the Ordinance, Section 3.13.2, does not subvert the federal scheme contemplated by RCRA.

In 1990, the Second Circuit affirmed the district court's decision which enjoined a corporate landowner from implementing a plan to "cap" a 4.25 acre, 40 foot high pile of chemical waste until it had received the necessary permit from the local planning and zoning commission. North Haven Planning & Zoning Comm's v. Upjohn Co., 921 F.2d 27, 28 (1990). The fact that the landowner had received the approval of the EPA and the state department of environmental protection did not relieve it of the obligation to obtain the approval of the local planning commission pursuant to its ordinances. State and federal approval did not, said the Court, pre-empt local approval. Id. It is clear, then, that zoning ordinances dealing with disposal of hazardous waste are not per se pre-empted by RCRA. And, in the instant case, the Court finding no legal or factual basis for a pre-emption argument concludes as a matter of law that the local Ordinance, Section 3.13.2, is not pre-empted by RCRA or its state counterpart.

II. Commerce Clause

The Commerce Clause, U.S. Const. Art. I, §8, cl. 3, authorizes Congress "to regulate commerce ... among the several states." The Supreme Court has interpreted the Clause to prohibit certain state actions which implicate interstate commerce. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87 (1987). So, for example, states are prohibited from legislating for the purpose of economic protectionism: "measures designed to benefit instate economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274, 108 S.Ct. 1803, 1807 (1988) (citations omitted). "[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." Id., 486 U.S. at 274.

The Third Circuit in Old Bridge Chemicals v. New Jersey Dept. Envir. Protect., No. 91-5789, 1992 U.S. App. LEXIS 13508 (3rd Cir. June 10, 1992) has articulated three standards of review for challenges to local laws premised upon the Commerce Clause. This Court has elected to by-pass that comprehensive analysis because on its face Section 3.13.2 is obviously devoid of economic animus toward out-of-state interests (and because the Court, as did the Third Circuit in Old Bridge Chemicals, has determined that RCRA does not preempt the field of hazardous waste management.). The Court finds that Section 3.13.2 is concerned with the health, safety and welfare of the local citizenry and is therefore a law directed to legitimate local concerns. City of Philadelphia v. New

Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535 (1978). Based upon the foregoing, the Court concludes that the ordinance is not violative of the Commerce Clause as an attempt to discriminate against out-of-state interests.

III. Section 3.13.2 as Originally Enacted

Blue Circle argues that HWF incineration, as contemplated by its plan, is not "disposal" but "recycling", therefore Section 3.13.2 as originally enacted is inapplicable to its proposed operations. Because the Court finds that Section 3.13.2, as amended, applies to Blue Circle's incineration plan, the Court need not reach this issue.

IV. Section 3.13.2 as Amended

Blue Circle argues that its "vested rights, equitable considerations, and the commencement of the instant case, preclude the application of Section 3.13.2, as amended, to ... [its incineration plan]." Pre-trial Order at 4, ¶ I.2. The Supreme Court of Oklahoma has recently addressed the issue. In the Matter of the Application of Julius Bankoff, No. 69,586 and No. 78,146, 1992 Okla. LEXIS 122 (Okla.S.Ct. June 16, 1992). There, the Board of Adjustment of Wagoner County denied an application for a conditional use permit to operate a solid waste disposal landfill. The trial court reversed the Board's decision, both sides appealed and while the appeal was pending the Board of County Commissioners of the County of Wagoner amended the ordinance at issue. The amended version, if applicable, would have foreclosed applicant's ability to obtain a permit. The Oklahoma Supreme Court in Bankoff

presented the following general statement of the law.

> Generally, a court will apply the law in effect at the time of review. If the law has been amended, it is the amended version which the court will consider even if the effect of the amendment renders the application moot ... a court will not spend its time deciding 'abstract propositions of law' or moot cases ... the controversy may become moot as a result of new or amendatory legislation that supersedes existing legislation ... the principle of repeal by implication, though not favored in law inasmuch as statutory provisions must be given effect, if possible, may nonetheless be invoked whenever (a) the later statute covers the whole subject matter of the earlier statute and contains new provisions showing that it was a substitute for the earlier act, even though it did not include words to that effect, or (b) when the later statute is repugnant to, or inconsistent with an earlier statute ... unless there be present on review some property or liberty interest which requires that we apply to the accrued or vested rights in controversy the law in force at a fixed point in time that is anterior to its most recent change, an amendment of controlling statutory law between nisi prius and appellate decisions compels the appellate court to apply the latest version of the pertinent law.

Id. at *5.

A. Application of the Amended Ordinance

First, it should be stated that this is not a case of retroactive application of an amended law. Blue Circle had not commenced operations when the amended ordinance was enacted, nor had it applied for a federal, state or local permit in connection with its incineration plans. The amendment, if applicable, would be prospective in its application. And pursuant to general law the Court concludes that the amended ordinance is applicable to Blue

Circle, absent a finding that its vested rights in the contemplated operation exempt it. Bankoff at *5.

B. Vested Rights in land use.

> "Defendant landowner does not have a vested right in the existing classification of his land. On the contrary, the enabling acts which authorize the enactment of zoning ordinances provide for the amendment of such ordinances. A landowner's right to establish a particular use can be summarily terminated by an amendment which reclassifies his land and outlaws the use in question." A landowner does not obtain a vested right in what has subsequently become a nonconforming use by filing a plan or by applying for a construction permit. Even the issuances of a building permit does not necessarily create a vested right unless the building is substantially under construction before zoning regulations are amended.

Bankoff at *8 quoting Marmah, Inc. v. Greenwich, 405 A.2d 63, 66 (Conn. 1978).

> "[i]n balancing the private and public interests herein, Owner's potential use of all property, under our system of government, is subordinate to the right of City's reasonable regulations, ordinances, ... and all similar laws that are clearly necessary and bear a rational relation to preserving the health, safety and general welfare of the residents..."

Bankoff at *10 quoting, April v. Broken Arrow, 775 P.2d 1347, 1352 (Okla. 1989).

> Generally, "in considering the basic foundation of zoning ordinance enacted in the proper exercise of police power, financial loss to an individual, firm or corporation affords no adequate ground for impeding or standing in the way of the general good and promotion of the public welfare."

Bankoff at *10 quoting, Van Meter v. H. F. Wilcox Oil and Gas Co., 41 P.2d 904, 909 (1935). In Bankoff, the Oklahoma Supreme Court

elected to exercise its equitable powers to exempt Bankoff from the Amended Ordinance by holding that his vested right in the operation precluded its application of the ordinance to him. Id. at *11. It reasoned that, as the district court had stated, 1) Bankoff "had done everything possible legally to obtain the CUP [conditional use permit]; 2) the Oklahoma State Department of Health had issued a permit authorizing ... operation pending local approval; and 3) [Bankoff] BFI had expended a substantial investment toward procuring approval. Moreover, ... [the commission] ... [should be] estopped to assert 'the requirement of actual use' in that Bankoff/ BFI was so prevented from going forward given the automatic stay imposed on it." Id. at 8. The trial court also found that the Board should have issued the permit initially. Id. at 11.

Bankoff is distinguishable from the instant case. Here, at the time of the Amendment, Blue Circle had not applied for any permits, had not done everything legally possible to obtain a permit. At the pre-trial conference, Blue Circle discussed its investments in the case and it is undisputed that Blue Circle has spent nothing on construction because it intends to use the existing kilns for HWF incineration. (It apparently anticipated construction of storage facilities at a later date). The Court concludes that Blue Circle is not entitled to the vested interest exception. In sum, therefore, the Court finds that it is not inequitable in the instant case to apply the general rule that the after-enacted amendment should be prospectively applied to Blue Circle's proposed HWF incineration plan.

The foregoing analysis was generated during the Court's preparation for the scheduled bench trial of this case. The Court's own research and consideration of the record led ineluctably to the conclusion that Defendant's Motion to Dismiss must be reconsidered. Whereupon, as a procedural matter and because the Court elected to consider matters on the record which were outside the pleadings, the Court determined that the matter should be treated as a motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P. see e.g., McQueen v. Shelby County, 730 F.Supp., 1449 (C.D. Ill. 1990). Thereupon, after review of the record considered in the light most favorable to Blue Circle, the Court concluded that no genuine issue of material remains for trial and therefore the Board is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that judgment is entered in favor of Defendant;

IT IS FURTHER ORDERED that this case is dismissed.

So ORDERED this 4th day of August, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

may be substituted for a solid fence on the rear of the use and up to the rear three-fourths of the use when the use abuts property in an AI, I3 or I4 District and such portion cannot be seen from a public street or road, which fact shall be determined by the Inspecting Officer. The fence shall be set back at least ninety feet from the center line of any abutting major thoroughfares and at least ten feet from the street line of such thoroughfares. No temporary or permanent building shall be erected within the required setback. All uses of this type shall be located at least two hundred feet from any property line in an AR, R, P, or O District.

Section 3.13 Solid Waste Disposal

Solid waste disposal shall be completely enclosed by a six foot high fence in accordance with Section 4.2. A gate for ingress and egress shall be permitted. A screen wall in accordance with Section 4.2 shall be erected where a solid waste disposal plant abuts a public street or road or where it can be seen from a residential development, which fact shall be determined by the Inspecting Officer. The fence shall be set back at least ninety feet from the center line of any abutting major thoroughfare and at least ten feet from the street line of such thoroughfares. No temporary or permanent building shall be erected within required setback. All solid waste disposal areas shall be located at least one thousand feet from any platted residential subdivision.

3.13.1 Operation of Site

Access roads to the operation shall be maintained in a dust free condition by surfacing or other treatment. All areas not specifically being worked by the actual digging and filling operation shall be maintained in a dust free condition by surfacing, sodding, or other treatment, i.e., when a trench is dug and subsequently filled, it will be immediately treated to dust free condition while work on the next trench is in process. Dust shall be minimized on the actual working area by wetting or other treatment.

An attendant shall be on duty at all times while hauling and dumping is in process to keep trash-blowing at a minimum. When an attendant is not present the area will be closed to all dumping. The stockpiling of trees, lumber, paper, and other burnable materials for subsequent burning shall be prohibited. The waste materials shall be covered at the end of each day and scatterings adequately policed to prevent blowing.

3.13.2 Industrial Waste Disposal

Industrial waste is defined as refuse products, either solid or liquid, which are to be discarded by the producer, and which are toxic to human, animal, aquatic or plant life and which are produced in such quantity that they cannot be safely disposed of in properly operated state-approved sanitary land fills, waste or sewage treatment facilities. Controlled industrial waste may include but is not limited to explosives, flammable liquids, spent acids, caustic solutions, poisons, sludge, tank bottoms containing heavy metallic ions, toxic

Exhibit "A"

organic chemicals, infectious materials, and materials such as paper, metal, cloth or wood which are contaminated with controlled industrial waste.

An Industrial Waste Disposal Site shall not be less than one hundred sixty (160) acres in size and no other industrial waste disposal site shall be nearer than one (1) mile (5,280 feet) in any direction from the proposed industrial waste disposal site. The site will be as nearly square as possible.

All operation of actual disposal site shall be confined to as near the center of the site as practical and in no case in violation of any Oklahoma State Department of Health Rules and Regulations or in violation of any other regulatory requirements. The operator of the industrial waste disposal site shall own in fee both the land (surface) and the minerals.

The operator shall file with the Planning Commission a comprehensive drainage spill protection plan which will clearly and specifically detail the permanent and emergency measures and permanent structures to be installed to protect the drainage area and all adjacent drainage areas from any contamination by industrial waste. The site operation plan filed with the Oklahoma State Department of Health may be used as a basis for this plan and added to if necessary to meet the requirements of this section.

All industrial waste disposal sites shall be located at least one (1) mile from any platted residential subdivision. For the purpose of this section a platted residential subdivision shall be defined as those areas zoned in an R, RM, RT, RST or AR zoning classification. All technical criteria of the industrial waste disposal site shall be controlled by the Oklahoma State Department of Health.

Section 3.14 Signs: General

All signs, whether accessory or advertising, shall comply with the provisions of this section, except where provisions to the contrary appear in the district provisions. All signs shall also comply with all applicable provisions of other regulations of the local unit of government.

3.14.1 Number and Area of Signs

The number of signs and total area of all faces of all signs, both accessory and advertising, exclusive of real estate signs, on any lot or on any street frontage of any lot, shall not exceed the number and areas set forth in the following table:

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2733

MAY 22 1992

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

Mr. John Summerbell
President
Blue Circle Cement, Inc.
1800 Parkway Place, Suite 1200
Marietta, Georgia 30067

Re: Ineligibility for Interim Status
Tulsa, Oklahoma Plant - OKD064558703

Dear Mr. Summerbell:

This is to inform you that the U. S. Environmental Protection Agency (EPA) believes that, based on the information you have provided to EPA, the Blue Circle, Incorporated facility in Tulsa, Oklahoma (Blue Circle) does not qualify for interim status under 40 CFR §266.103 (a)(1)(ii), 56 Federal Register 7134, 7213 (February 21, 1991).

On August 21, 1991, Blue Circle applied for interim status by submitting a Part A permit application and a Certification of Precompliance under the Boiler and Industrial Furnace (BIF) rule to burn hazardous waste in cement kilns at the Tulsa, Oklahoma facility. According to the information submitted, the cement kiln at this facility was not burning hazardous waste prior to the effective date of the BIF rule. Blue Circle entered into a contract on August 20, 1991, for the construction necessary to accommodate the use of hazardous waste fuels in the cement kiln at this facility.

One of the requirements for interim status under Subsection 3005 (e)(1)(A); 42 U.S.C. § 6925 (e)(1)(A) of the Resource Conservation and Recovery Act (RCRA) is that a facility be in existence on the effective date of statutory or regulatory changes under RCRA that render the facility subject to the requirement to have a permit under RCRA Section 3005. Pursuant to subsection 3004 (q) of RCRA, 42 U.S.C. § 6924 (q), on February 21, 1991, the EPA promulgated the BIF rule for the burning of hazardous waste in boilers and industrial furnaces, including the requirement for a permit. 56 Fed. Reg. 7134 (February 21, 1991). The BIF rule became effective August 21, 1991.

Exhibit "B"

[e]xisting or in existence means a boiler or industrial furnace that on or before August 21, 1991 is either in operation burning or processing hazardous waste of for which construction (including the ancillary facilities to burn or process the hazardous waste) has commenced. A facility has commenced construction if owner or operator has obtained the Federal State, and local approvals or permits necessary to begin physical construction; and either:

(A) A continuous on-site, physical construction program has begun; or

(B) the owner and operator has entered into contractual obligations - which cannot be canceled or modified without substantial loss - for physical construction of the facility to be completed within a reasonable time."

In order for a facility to be considered "in existence", all Federal, State, and local approvals must be obtained if the regulations on which the approvals are based specifically regulate the treatment, storage or disposal of hazardous waste or the location of a hazardous waste management facility. Section 3.13.2 of the Rogers County Zoning Regulations, specifically regulates the location of hazardous waste facilities. The Resolution passed by the Rogers County Board of County Commissioners, on August 12, 1991, states that the proposed burning of hazardous waste at Blue Circle violates these zoning regulations and is not approved by Rogers County Commissioners.

The burning of hazardous waste at Blue Circle is subject to the Section 3.13.2 of the Rogers County Zoning Regulations. Approval of this activity at Blue Circle, is necessary for the Tulsa Plant to meet the definition of an existing facility under RCRA. Blue Circle did not obtain the approval to burn hazardous waste at the Tulsa Plant prior to the effective date of the BIF Rule, therefore, the Tulsa Plant is not an existing facility.

Under 40 CFR §266.103 (a)(1)(ii), the storage and transfer units which Blue Circle proposes to construct are " ancillary facilities" to process hazardous waste. As a result, Blue Circle was required to enter into a contract by August 21, 1991, for construction of these facilities "to be completed within a reasonable time". The contract provided to EPA by Blue Circle does not contain a construction schedule. Furthermore, in response to a RCRA § 3007 information request which specifically sought a copy of a construction schedule, Region 6 was informed that no construction schedule, other than the construction contract, existed. Therefore, Blue Circle has not entered into a contract for construction to be completed within a reasonable time.

Blue Circle did not obtain all the "Federal, State and local approvals or permits necessary to begin physical construction" or "contractual obligations for the physical construction of the facility to be completed within a reasonable time " prior to the effective date of the BIF

[redacted]ue Circle did not ob[illegible]in [illegible]he "Federal, State and local a[illegible]ls or permits necessary to begin physical construction" or "contractual obligations for the physical construction of the facility to be completed within a reasonable time" prior to the effective date of the BIF rule. The Tulsa Plant, therefore, was not "in existence" and does not qualify for Federal interim status under RCRA.

If you have any questions concerning this matter please contact Mr. Ruben Casso of my staff at (214) 655-6785.

Sincerely yours,

Jack Ferguson

For Allyn M. Davis, Director
Hazardous Waste Management Division (6H)

cc: Damon Wingfield, OSDH

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PEMBERTON NISSAN, INC., an Oklahoma Corporation,	)	
Plaintiff,	)	
vs.	)	92-C-208-B
NISSAN MOTOR CORPORATION IN U.S.A. a California Corporation,	)	
Defendant,	)	

ORDER

Upon consideration of the Joint Application for Dismissal with Prejudice, the Court finds that the Application is meritorious and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-captioned lawsuit be dismissed with prejudice to its refiling.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID A. WHITE,

Plaintiff,

v.

UNIVERSITY OF TULSA, THE UNIVERSITY OF TULSA COLLEGE OF LAW, PROFESSORS CHAPMAN, HAGER, LIMAS, TANAKA, CLARK, ADAMS; AND SHEILA POWERS,

Defendants.

Case No. 90-C-421-B

AMENDMENT TO ORDER

Before the Court is an amendment to the Court's order of July 29, 1992. The order is hereby amended as follows:

On Page 9, lines four and seven, the word "Plaintiff" shall be substituted for the word "Defendant".

In addition, on Page 3, Footnote 1 shall read as follows:

Count I, intentional and/or negligent infliction of emotional distress; Count II, negligence; Count III, invasion of privacy and Count V, breach of contract. First Amended Complaint.

IT IS SO ORDERED, this 4th day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity,

Plaintiff,

vs.

BEACON DEVELOPMENT, INC., an Oklahoma corporation, et al.

Defendants.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, as successor in interest to United Oklahoma Bank, an Oklahoma State chartered financial institution,

Third-Party Plaintiff,

vs.

CLIFFORD JAY MILLER, JOHN W. MAYES and ROBERT H. MITCHELL,

Third-Party Defendants.

No. 90-C-852-E

FINAL ADMINISTRATIVE CLOSING ORDER
AS TO FDIC AND CLIFFORD JAY MILLER

Pursuant to a Compromise Settlement Agreement executed by Third-Party Plaintiff Federal Deposit Insurance Corporation in its corporate capacity as successor in interest to United Oklahoma Bank ("FDIC") and Third-Party Defendant Clifford Jay Miller ("Miller"), the parties have agreed to the disposition of the above captioned case with respect to FDIC's claims against Miller. Pursuant to the terms of said Agreement, this case should be and is hereby ordered Administratively Closed for a period of three years and two months with prejudice to the rights of Miller and/or FDIC to reopen the

proceeding as to each other. Provided, however, FDIC shall retain the right to reopen this proceeding upon Application for the purpose of filing and enforcing a Stipulated Partial Journal Entry of Judgment in Favor of Third-Party Plaintiff FDIC executed by counsel for Miller and FDIC in the event of default by Miller as defined in the Compromise Settlement Agreement and other documents executed therewith.

If within three years and two months from the date of this Order, FDIC has not filed an Application to Reopen this proceeding, then this action shall be dismissed with prejudice.

S/ JAMES O. ELLISON

United States District Court Judge

APPROVED:

Gary W. Boyle, Esq.
BOESCHE, MCDERMOTT & ESKRIDGE
800 ONEOK Plaza
100 West 5th Street
Tulsa, Oklahoma 74103
(918) 583-1777

ATTORNEYS FOR DEFENDANT AND THIRD-PARTY PLAINTIFF FEDERAL DEPOSIT INSURANCE CORPORATION

Bart A. Boren, Esq.
WILLIAMS, LUTTRELL & BOREN
401 North Hudson
Suite 200
Oklahoma City, OK 73102
(405) 232-5220

ATTORNEYS FOR THIRD-PARTY DEFENDANT CLIFFORD JAY MILLER

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY,

Plaintiff,

vs.

BEACON DEVELOPMENT, INC., an Oklahoma corporation, RICHARD C. DAVIS, a single person; BEACON REALTY INVESTMENT COMPANY, a general partnership; FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to United Oklahoma Bank; RAYMOND DALE LEWIS a/k/a RAYMOND D. LEWIS, JUDY MAE GRAHAM, a single person, NOVA ARLENE LEWIS, if living, or if deceased, her unknown successors,

Defendants.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, as successor in interest to United Oklahoma Bank, an Oklahoma state chartered financial institution,

Third-Party Plaintiff,

vs.

CLIFFORD JAY MILLER, JOHN W. MAYES and ROBERT H. MITCHELL,

Third-Party Defendants.

Case No. 90-C-852-E

AGREED JUDGMENT

This matter comes on for hearing upon the agreement of the appearing parties, as shown by the signatures of their counsel below, and the Court being fully advised of the settlement agreement entered into among the parties appearing in the case next examined the court files

and the original complaint and other instruments offered by Plaintiff, and the Court having heard the arguments of counsel and being well and truly advised, finds:

1. That it has jurisdiction of the subject matter and the parties, trial by jury having been waived and no necessity existing for a pre-trial conference, and no necessity existing for a Motion for Default Judgment, the Court finds that the Defendants Raymond Dale Lewis a/k/a Raymond D. Lewis and Judy Mae Graham, a single person, have each filed their Disclaimers herein, and that Nova Arlene Lewis, if living, or if deceased, her unknown successors, were served Notice by Publication, have failed to appear, plead or answer and are in default. The Court conducted a judicial inquiry into the sufficiency of Plaintiff's search to determine the names and whereabouts of the Defendants who were served herein by publication, and based on the evidence adduced, the Court finds that Plaintiff has exercised due diligence and has conducted a meaningful search of all reasonably available sources at hand. The Court approves the publication service given herein as meeting both statutory requirements and the minimum standards of federal due process; and that said Defendants have failed to answer in the time allowed and are in default; and the appearing parties have shown to the Court that the disputes among them have been settled and resolved, and that as a part of the settlement judgment should be entered on the terms herein stated.

2. That the Plaintiff, Federal Deposit Insurance Corporation, in its corporate capacity, should have and recover judgment in rem on its first and second claims for relief finding that there is due, owing and unpaid to Plaintiff on the Note and Mortgage sued upon in its first and second claims for relief the sum of $269,418.30, plus interest at the rate of 12% per annum from June 18, 1984; $225.00 for abstract expense; plus advances for taxes and insurance and costs herein under its Note dated June 18, 1984, and that it owns a good and valid first mortgage on the following described property situated in Tulsa County, Oklahoma, to-wit:

> A tract of land in the N½, E½, W½, NE¼, NW¼, of Section 8, Township 19 North, Range 14 East, I.M., Tulsa County, Oklahoma, described as BEGINNING on the West line of the N½, E½, W½, NE¼, NW¼, said point being 70 feet South of the North line of Section 8; THENCE North 89°43'00" East, 150 feet to the point or place of beginning; THENCE continuing North 89°43'00" East, 169.84 feet; THENCE South 00°25'39" East, 266 feet; THENCE South 89°43'00" West, 140 feet; THENCE North 00°25'39" East 13.50 feet; THENCE South 89°43'00" West 179.82 feet; THENCE North 00°25'50" West, 92.50 feet; THENCE North 89°43'00" East 100 feet; THENCE North 00°25'50" West, 137.50 feet; THENCE North 89°43'00" East, 50 feet; THENCE North 00°25'00" West 22.50 feet to the point or place of beginning,

superior to the claims of all Defendants, same to be sold with appraisement on Praecipe filed,

if not paid forthwith, said mortgage having been recorded in the office of the County Clerk of Tulsa County, Oklahoma on January 17, 1984, in Book 4759, page 1454 as alleged in the second claim for relief in Plaintiff's complaint.

3. That the Plaintiff, Federal Deposit Insurance Corporation, in its corporate capacity, should have and recover a further judgment reforming the mortgage sued upon in its second claim for relief in its complaint to include a perpetual easement reserved in a Deed recorded in the office of the Tulsa County Clerk in Book 4197, page 887, which easement allowed the grantors or their assignees to construct sewer lines, electrical, telephone, water or gas or any other utility, and for the purpose of ingress and egress without reservation, across a tract which is described as follows, to-wit:

> BEGINNING at a point at the West line of the N/2 of the E/2 of the W/2 of the NE/4 of the NW/4, said point beginning 70.00 feet South of the North line of Section 8, Township 19 North, Range 14 East; THENCE N 89°43'00" E and parallel with the North line of Section 8 a distance of 100.00 feet to the point of beginning; THENCE N 89°43'00" E a distance of 50.00 feet; THENCE S 0°25'50" E a distance of 22.50 feet; THENCE S 89°43'00" W a distance of 50.00 feet; THENCE N 0°25'50" W a distance of 22.50 feet to the point of beginning.

and should have and recover judgment ordering that said easement is appurtenant to the property covered by the mortgage sued upon in Plaintiff's second claim for relief and the rights under said easement are also foreclosed by this decree. The property covered by the mortgage sued upon in Plaintiff's second claim for relief, including the appurtenant easement, is called Tract One.

4. That the Plaintiff, Federal Deposit Insurance Corporation, in its corporate capacity, should have and recover judgment in rem finding that there is due, owing and unpaid to Plaintiff on the Note and Mortgages sued upon in the third and fourth claims for relief in Plaintiff's complaint, the sum of $69,282.29 together with interest thereon of $2,907.16 to October 15, 1987 and thereafter accruing at 12% per annum until paid; plus advances for taxes and insurance; and court costs herein under its Note dated September 15, 1984 and its Mortgages dated June 10, 1980 and March 3, 1981, and that it owns a good and valid first mortgage on the following described property situated in Pawnee County, Oklahoma, to-wit:

> A tract of land in the Southwest Quarter (SW/4) of the Southwest Quarter (SW/4) of Section 20, Township 20 North, Range 9 East, Pawnee County, Oklahoma; according to the Government Survey thereof, and more particularly described as follows: Commencing at the Southwest Corner, THENCE North 0°02'06" West a distance of 165.02 feet; THENCE North 33°42'55" East a distance of 592.11 feet; THENCE South 89°33'24" East a distance of 328.98 feet; THENCE North 0°02'35" West a distance of 164.65 feet; THENCE South 89°31'26" East a

distance of 214.57 feet to the point of beginning; THENCE continuing South 89°31'26" East a distance of 443.36 feet, THENCE South 0°03'06" East a distance of 259.12 feet, THENCE North 89°33'24" West a distance of 443.36 feet, THENCE North 0°03'06" West a distance of 259.34 feet to the point of beginning, LESS AND EXCEPT all oil, gas and other minerals, which tract is hereafter called Tract Two,

superior to the claims of all Defendants, same to be sold with appraisement on Praecipe filed, if not paid forthwith, said mortgages having been recorded in the office of the County Clerk of Pawnee County, Oklahoma, on June 20, 1980 and March 6, 1981, respectively, in Book 251, page 247 and Book 272, page 289 as alleged in the fourth claim for relief in said complaint.

5. That defaults occurred under said notes and mortgages as alleged in the complaint and Plaintiff as owner and holder of said notes and mortgages is entitled to judgment as aforesaid.

6. That the Defendant/Third-Party Plaintiff Federal Deposit Insurance Corporation, in its corporate capacity as successor in interest to United Oklahoma Bank, an Oklahoma state chartered financial institution ("Third- Party Plaintiff"), has a valid second mortgage on Tract Two superior to the rights of all parties herein except the note, mortgage and judgment of Plaintiff and the second mortgage is recorded at Book 354, page 583, in the records of the Pawnee County Clerk. That Third-Party Plaintiff should have and recover judgment in rem on its second mortgage against Richard C. Davis in the sum of $217,453.42 plus accrued interest through January 14, 1991 in the sum of $109,632.53, plus interest accruing from and after January 14, 1991 until paid; plus costs.

7. That judgment should be entered against the Defendants Beacon Development, Inc., an Oklahoma corporation, Richard C. Davis, a single person, and Beacon Realty Investment Company, a general partnership, that any right, title or interest that they may claim in Tract One including the appurtenant easement, is subject and inferior to the note, mortgage and judgment of Plaintiff, and that any right, title or interest that they may claim in and to Tract Two is subject and inferior to the note, mortgage and judgment of Plaintiff and subject and inferior to the note, mortgage and judgment of the Third-Party Plaintiff, and that any and all such rights, titles and interests are foreclosed by this decree.

8. That Defendants Nova Arlene Lewis, if living, or if deceased, her unknown successors, are in default and due to such default should be cut off from claiming any interest in the above described property and that Defendants Raymond Dale Lewis a/k/a Raymond D. Lewis and Judy Mae Graham, a single person, having filed their Disclaimers herein, should be cut off from claiming any interest in the above described property.

9. That as a part of the settlement agreement entered into among the parties, the claims of the Third-Party Plaintiff against the Third-Party Defendant Robert H. Mitchell should be dismissed with prejudice.

10. That as a part of the settlement agreement entered into among the parties the claims of the Third-Party Plaintiff against the Third-Party Defendants John W. Mayes and Clifford Jay Miller are reserved from this order and are to be separately considered and decided by the Court. The consideration of the reserved claims shall not require notice to nor the participation of the Plaintiff and other defendants. The Court finds that there is no reason to delay judgment as herein entered because of the reserved claims and the Court expressly directs the filing of this judgment, which is a final adjudication of all controversies properly before this Court except the reserved claims above set forth.

ALL OF THE FOREGOING IS SO ORDERED, ADJUDGED AND DECREED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that upon sale of Tract One including the appurtenant easement, the proceeds from the sale shall be applied as follows, to-wit:

FIRST: To the payment of costs of sale and court costs herein.

SECOND: To the payment of the in rem judgment of Plaintiff in the sum of $269,418.30 plus interest thereon at 12% per annum until paid from June 18, 1984, abstract expense of $225.00, plus advances and costs.

THIRD: The remainder, if any, as the Court may direct.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that upon the sale of Tract Two pursuant to this judgment the proceeds from this sale shall be applied as follows, to-wit:

FIRST: To the payment of costs of sale and court costs herein.

SECOND: To the payment of the in rem judgment of Plaintiff in the amount of $69,282.29 with interest of $2,907.16 to October 15, 1987 and thereafter at 12% per annum until paid, plus advances and costs.

THIRD: To the payment of the in rem judgment of Third-Party Plaintiff in the amount of $217,453.42 plus interest accrued through January 14, 1991 in the amount of $109,632.53, plus interest thereafter until paid, plus costs.

FOURTH: The remainder, if any, as the Court may direct.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that upon

confirmation of the sales and delivery of Marshall's or Sheriff's Deed, said properties shall be free and clear of the claims of all Defendants and all persons claiming under said Defendants since the filing of the complaint herein shall have no right, title, interest, claim, lien or demand in or to said properties.

/s/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AND AGREED:

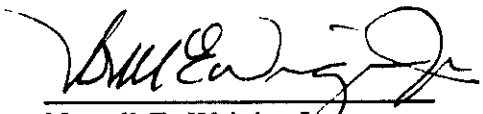
THE LAW OFFICES OF
HEMRY & HEMRY, P.C.

By _____
William P. McDoniel,
P.O. Box 2207
Oklahoma City, Oklahoma 73101
(405) 235-3571
Attorneys for Plaintiff

_____
Bob Owen
920 Northwest 18th Street
Oklahoma City, Oklahoma 73106
(405) 524-3986
Attorney for Defendants
Richard C. Davis, Beacon Development, Inc.,
and Beacon Realty Investment Company

_____
Gary W. Boyle
BOESCHE, McDERMOTT & ESKRIDGE
800 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 583-1777
Attorneys for
Defendant/Third-Party Plaintiff FDIC

Bart A. Boren
WILLIAMS, LUTTRELL & BOREN
401 North Hudson, Suite 200
Oklahoma City, Oklahoma 73102
(405) 232-5220
Attorney for Third-Party Defendant
Clifford Jay Miller



Newell E. Wright, Jr.
2424 Northwest 39th Street
Oklahoma City, Oklahoma 73112
(405) 525-6710
Attorney for Third-Party Defendant
Robert H. Mitchell

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,	)	
	)	
Plaintiff,	)	
	)	Consolidated Cases Nos.
	)	
v.	)	89-C-868-B
	)	89-C-869-B
	)	90-C-859-B
AMERICAN AIRLINES, INC., Et. Al.,	)	
	)	
Defendants.	)	

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Now on this 4th day of August, 1992, all parties hereto please take notice that pursuant to Rule 41 (a) of the Federal Rules of Civil Procedure and Section V. of the Case Management Order the Plaintiff hereby dismisses without prejudice this action against the following Defendants only, and expressly reserves its causes of action against all other Defendants, not heretofore dismissed from this action:

Cherokee Lines, Inc.

Gary A. Eaton, OBA #2598
Attorney at Law
1717 East 15th St.
Tulsa, OK 74104
918 743 8781

CERTIFICATE OF MAILING

The undersigned certifies that on August 4, 1992, a true and correct copy of the above instrument / pleading was mailed with postage prepaid to the following persons:

Mr. Larry Gutterridge, Co-Counsel for Plaintiff, 633 West 5th Street, 35th Floor, Los Angeles, California 90071

Mr. William Anderson, Attorney at Law and Liaison Counsel and Co-Lead Counsel for Owners and Non-Operator Lessees Group, 320 South Boston Building, Suite 500, Tulsa, OK 74103

Mr. John Tucker, Lead Counsel for Non Group Generators and Transporters, 2800 Fourth National Bank Building, Tulsa, OK 74119

Mr. Steven Harris, Attorney at Law and Lead Counsel for Operators Group, Suite 260 Southern Hills Tower, 2431 East 61st Street, Tulsa, OK 74136

Mr. Charles Shipley, Attorney at Law and Settlement Coordinator, 3600 First National Tower, Tulsa, OK 74103

Ms. Claire V. Eagan, Mr. Michael Graves, and Mr. Matthew Livengood, Attorneys at Law and Lead Counsel for the Sand Springs PRP Group, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, OK 74172

Name

WILKSTIP.AUG

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES A. WILKINS,
PLAINTIFF,
vs.
CITY OF TULSA, OKLAHOMA,
A MUNICIPAL CORPORATION ACTING
BY AND THROUGH THE TULSA AREA
COUNCIL ON AGING, AND TULSA
AREA AGENCY ON AGING, AND
OSAGE COUNTY, OKLAHOMA,
ACTING THROUGH THE OSAGE
BOARD OF COUNTY COMMISSIONERS,
DEFENDANTS.

NUMBER 91-C-766-B

STIPULATION OF DISMISSAL

COMES NOW THE PLAINTIFF herein and dismisses without prejudice the claim of the Plaintiff as against Osage County, Oklahoma, acting through the Osage County Board of Commissioners. Osage County, Oklahoma acting through the Osage County Board of Commissioners stipulates to said dismissal.

LARRY STUART
OSAGE COUNTY DISTRICT ATTORNEY
BY: John J. Boggs, Jr.
JOHN S. BOGGS, JR.
ASSISTANT DISTRICT ATTORNEY

Bruce W. Gambill
BRUCE W. GAMBILL OBA#3222
GAMBILL & ASSOCIATES
ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAGGIE R. HARREL,

Plaintiff,

vs.

WAL-MART ASSOCIATES GROUP HEALTH PLAN,

Defendant.

No. 91-C-503-E

ORDER AND JUDGMENT

Comes now before the Court for its consideration Plaintiff's Motion for New Trial and Alternative Motion to Amend Judgment. After review of the record, the Court finds that its previous Order entered on May 21, 1992, should be affirmed; Plaintiff's Motion for New Trial and Alternative Motion to Amend Judgment should be denied.

Continuation coverage under group health plans is regulated under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001 - 1461 (1982 and Sup.Vol. 1991), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 U.S.C. §§1161 - 1168 (1982 and Sup.Vol. 1991).

Under 29 U.S.C. §§1161, Continuation Coverage Under Group Health Plans, a "qualified beneficiary" is entitled to elect within an election period (see §1165 infra.) continuation coverage under the group health plan. The Court finds Plaintiff is a qualified beneficiary. Continuation coverage means the coverage which, as of the time it is provided, is identical to the coverage provided

under the plan to similarly situated beneficiaries under the plan with respect to whom a "qualifying event" has not occurred.

The Court finds Plaintiff's argument, oral and written, concerning the nature of her termination and exact date of termination unpersuasive. Moreover, the undisputed facts establish that regardless of whether Plaintiff's termination was voluntary or involuntary, Plaintiff after consulting with an attorney, failed to comply with the February 10, 1992, notice requirements to "continue" her coverage pursuant to the provisions of COBRA. Further, at no time following January 26, 1991 did Plaintiff affirmatively elect to remit a timely premium payment to the health plan to keep her coverage in force. Accordingly, Plaintiff's coverage ended January 26, 1991, two days prior to surgery.

IT IS THEREFORE ORDERED that Plaintiff's Motion for New Trial and Alternative Motion to Amend Judgment is hereby denied. This Order affirms the Court's prior Order entered on May 21, 1992.

So ORDERED this 4th day of August, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH COTTON,)
)
Plaintiff,)
)
v.) 92-C-607-B
)
RON CHAMPION,)
)
Defendant.)

ORDER TO TRANSFER CAUSE

The Court having examined the Petition for Writ of Habeas Corpus which the Petitioner has filed finds as follows:

(1) That the Petitioner was convicted in Oklahoma County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma.

(2) That the Petitioner demands release from such custody and as grounds therefore alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.

(3) In the furtherance of justice this case should be transferred to the United States District Court for the Western District of Oklahoma.

IT IS THEREFORE ORDERED:

(1) Pursuant to the authority contained in 28 U.S.C. §2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the Untied States District Court for the Western District of Oklahoma for all further proceedings.

(2) The Clerk of this Court shall mail a copy of this Order to the Petitioner.

Dated this 30th day of Aug., 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 0 3 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity,

Plaintiff,

vs.

HENDERSON HILLS SHOPS, INC., et al.,

Defendants.

No. 89-C-144-E

ENTERED ON DOCKET
DATE AUG 4 1992

JUDGMENT

This cause coming on for hearing this 3rd day of August, 1992, before the undersigned Judge, the parties appearing by and through their attorneys of record, and it appearing to the Court that this is a suit upon a promissory note, and for foreclosure of a mortgage upon real estate securing the same, which said real estate is located in the County of Creek, State of Oklahoma, and for recovery upon a guaranty;

It further appearing to the Court that due and legal service was properly obtained by serving the defendants with summons herein more than 20 days prior to this date;

And it further appearing to the Court that the defendants Henderson Hills Shops, Inc., and C. A. Henderson (the "Defendants") have answered and admitted the allegations of the Complaint, the Court further finds and adjudges as follows:

1. On or about August 21, 1982, Defendant Henderson Hills Shops, Inc. executed a promissory note in the principal sum of $320,000.00 in favor of Century Bank (the "Note").

2. FDIC, in its corporate capacity, is successor to all of the Bank's right, title and interest in the Note and all related security agreements and guaranties.

3. By its Judgment dated February 6, 1992, this Court has previously ordered, adjudged and decreed that Defendant Henderson Hills Shops, Inc. has failed to pay the indebtedness due pursuant to the Note and is in default thereunder, and has ordered foreclosure of the Mortgage securing the Note.

4. As additional security for the Indebtedness, Defendant C. A. Henderson executed and delivered to the Bank on August 1, 1982, a guaranty (the "Guaranty") of the Indebtedness, which was reaffirmed on August 1, 1985.

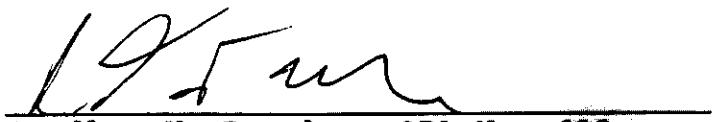
5. After giving effect to the value of certain collateral securing the Indebtedness, the remaining amount of the Indebtedness guaranteed by the Guaranty is Seventy-Five Thousand Dollars ($75,000.00).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff have and recover from Defendant C. A. Henderson the principal sum of $75,000.00, together with interest at the statutory rate after the date of this judgment, and the costs of this action.

For all of which, let execution issue.

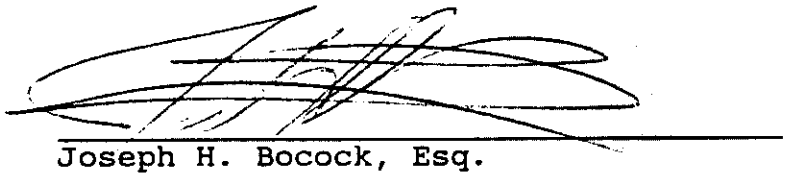
UNITED STATES DISTRICT JUDGE

APPROVED:



Bradley K. Beasley, OBA No. 628
R. David Whitaker, OBA No. 10520
of BOESCHE, McDERMOTT & ESKRIDGE
800 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103
(918) 583-1777

ATTORNEYS FOR FEDERAL DEPOSIT
INSURANCE CORPORATION



Joseph H. Bocock, Esq.
MCAFEE & TAFE
Two Leadership Square
10th Floor
Oklahoma City, OK 73102

ATTORNEY FOR DEFENDANTS
HENDERSON HILLS SHOPS, INC.
AND C.A. HENDERSON

ls\HHills.Jmt\RDW-8
August 28, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STEPHAN D. WILLIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	91-C-842-B
	)	
STANLEY GLANZ, et al,	)	
	)	
Defendants.	)	

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed July 9, 1992 in which the Magistrate Judge recommended that the Motion for Summary Judgment be granted.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 3rd day of Aug, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 0 3 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff,

vs.

JANELL RUTH VAN Y, and the heirs at law of Robert L. Gerot,

Defendants.

Case No. 92-C-415-E

ENTERED ON DOCKET
DATE AUG 4 1992

ORDER AND JUDGMENT

With the agreement of Plaintiff, Metropolitan Life Insurance Company ("Metropolitan"), and Defendant, Janell Ruth Van Y ("Van Y"), the Court hereby enters the following Order and Judgment in this matter, pursuant to F.R.C.P. 58 and 79.

1. Metropolitan is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York. Metropolitan is authorized to do business and is doing business in the State of Oklahoma.

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331, 28 U.S.C. §2201, Rule 22 of the Federal Rules of Civil Procedure, and the Federal Employees Group Life Insurance Act, 5 U.S.C. §8701 et seq. and 5 C.F.R. §870 et seq. (hereinafter "FEGLI"). Metropolitan's claim arises under the FEGLI Act, thus raising a federal question for purposes of 28 U.S.C. §1331.

3. The Court has personal jurisdiction over Van Y, who was served with process on or about May 15, 1992. Venue properly lies in this Court pursuant to 28 U.S.C. §1391(b). Van Y resides within this judicial district and the claim arose in whole or in part within this judicial district.

4. Robert Lee Garot ("Garot") was employed as a federal police officer for the United States Postal Inspection Service. As such, Garot was entitled to life insurance

coverage under the Federal Employees Group Life Insurance Program which is administered by the Office of Personnel Management. Coverage was issued through Metropolitan's group policy number 17,000-G, as amended (the "Policy"). A specimen of the Policy is attached to Metropolitan's Complaint for Declaratory Judgment and Interpleader as Exhibit "A" and incorporated by reference. The face amount of coverage for Garot under the Policy is $22,000.00.

5. On or about November 22, 1990, Garot died. The Policy was in full force and effect at the time of his death. Metropolitan currently holds the sum of $24,313.76, which represents the face amount of coverage and accrued interest, the total amount due under the Policy.

6. Pursuant to the FEGLI Act and the Policy, upon Garot's death, Metropolitan was obligated to pay the benefits in the following order of precedence:

> The amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:
>
> > First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office or, if insured because of receipt of annuity or of benefits under subchapter I of chapter 81 of this title as provided by section 8706(b) of this title, in the Office of Personnel Management. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.
> >
> > Second, if there is no designated beneficiary, to the widow or widower of the employee.
> >
> > Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation.
> >
> > Fourth, if none of the above, to the parents of the employee or the survivor of them.
> >
> > Fifth, if none of the above, to the duly appointed executor or administrator of the estate of the employee.
> >
> > Sixth, if none of the above, to other next of kin of the employee entitled under the laws of the domicile of the

employee at the date of his death.

5 U.S.C. §8705(a). See also Exh. "A" to Metropolitan's Complaint, pp. 5-6. The Policy also provides that if any beneficiary named by the insured predeceases the insured, the rights of such a beneficiary automatically terminate. Exh. "A", p. 5.

7. Garot originally designated Vivian Garot, his mother, as beneficiary of the Policy. Vivian Garot died on March 13, 1987, and therefore any rights to the proceeds she may have had terminated at that time.

8. Van Y submitted a claim for death benefits by reason of Garot's death dated January 19, 1991. Van Y claimed entitlement to the proceeds of the Policy as the "Common Law Wife" of Garot. A true and correct copy of the claim for benefits is attached to Metropolitan's Complaint for Declaratory Judgment and Interpleader as Exhibit "B".

9. During the course of its investigation into the claim, Metropolitan discovered certain documentation which caused doubt and rendered Metropolitan unable to conclude that it could safely pay the proceeds to Van Y. That documentation received by Metropolitan included a copy of the Last Will and Testament of Robert Lee Garot, dated July 16, 1986, which stated in part that:

> I declare that I am not now married, whether by legal ceremony or by common law. I have children. I intentionally disinherit them from taking under my Will. Should any or all of them contest this Will, each contestant shall receive the sum of One Dollar and No/100 ($1.00).

Last Will and Testament of Robert Lee Garot, a copy of which is attached to Metropolitan's Complaint for Declaratory Judgment and Interpleader as Exhibit "C", p. 1.

10. In addition, Metropolitan received copies of portions of Garot's tax returns for the years 1981, 1982, 1983, 1984, 1986, 1988 and 1990, which reflected Garot's filing status as "Single". Copies of the portions of the tax returns received by Metropolitan are attached to Metropolitan's Complaint for Declaratory Judgment and Interpleader as Exhibit "D".

11. On or about May 8, 1992, Van Y instituted a proceeding in the Probate Division of the District Court of Tulsa County pursuant to 84 Okla.Stat. §251 et seq. in order to determine succession or heirship of Garot, being Case No. P-92-405 in that Court. Pursuant to that proceeding, Van Y sought to have the Court declare the heirs at law of Garot.

12. Pursuant to its Order of June 30, 1992, the Court in Case No. P-92-405 determined that Van Y was the common law wife of Garot and that there were no other successors, relations, or relatives or issue of Garot. A true and correct copy of the Judgment is attached hereto as Exhibit "1" and incorporated herein by reference.

13. Based upon the Judgment in Case No. P-92-405, the Court hereby finds that as common law wife of Garot, Van Y is entitled to the proceeds held by Metropolitan and which are due and owing under the Policy, and that there exist no other heirs at law of Garot who may be entitled to such proceeds.

14. Metropolitan, upon payment of $24,313.76 to Van Y, is discharged from any and all further liability to Van Y or any other alleged heirs at law of Garot. Van Y and/or any other alleged heirs at law of Garot are barred from asserting any other or further claims against Metropolitan relating to the Policy or the matters arising out of or relating to Metropolitan's Complaint.

15. The parties shall bear their own respective attorney's fees and costs.

Dated this 31st day of July, 1992.

James O. Ellison, Chief Judge

AGREED TO AND APPROVED:

Timothy A. Carney
Attorney for Plaintiff

James Pratt
Attorney for Defendant Van Y

Janell Ruth Van Y, Defendant

A\TAC\07-92430\cls

OBA# 7279

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

DISTRICT COURT
FILED
JUN 30 1992
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA, COUNTY

JANELL RUTH VAN Y

Plaintiff,

vs.

The UNKNOWN SUCCESSORS, RELATIONS, RELATIVES, or ISSUE, of ROBERT LEE GAROT, Deceased, whether living or dead; and METROPOLITAN LIFE INSURANCE COMPANY,

Defendants.

Case No. P 92-405

ORDER

THIS MATTER coming on for the regularly set and published hearing date, June 22, 1992, at 10:30 o'clock a.m., before the undersigned Judge, upon Plaintiff's Petition to Determine Succession or Heirship, pursuant to 84 O.S. § 251, et. seq., the case being called, the Plaintiff being present in person, and through her attorney of record, James R. Pratt; the Defendant Metropolitan Life Insurance Company, having received actual notice of this hearing, but failing to appear; and proof of publication as required by law being made, supported by affidavit, but no other parties appearing as a result thereof;

The Court, having reviewed the Court file, having heard the testimony of three sworn witnesses, and having examined the exhibits admitted, does hereby **FIND:**

1) That the Defendant Metropolitan Life Insurance Company, received actual notice of this hearing, but failed to appear; and, Further, that constructive notice was given to the public by publication as required by law, supported by affidavit, but that no other parties appear as a result thereof.

EXHIBIT
1

2) That by clear, convincing, and unrefuted evidence the Plaintiff and ROBERT LEE GAROT decided on September 15, 1983 to, and did establish an exclusive relationship to cohabit as, and hold themselves out to all the world as, Husband and Wife, by common law marriage,

3) That by clear, convincing, and unrefuted evidence, ROBERT LEE GAROT and the Plaintiff remained Husband and Wife continually, and uninterruptedly until the death of said ROBERT LEE GAROT on the 22nd day of November, 1991.

4) That by clear, convincing, and unrefuted evidence the Plaintiff is the Widow of ROBERT LEE GAROT.

5) That there are no other successors, relations, relatives or issue, whether living or dead, of ROBERT LEE GAROT.

6) That this case appears to be a proper case for the assessment of attorney's fees pursuant to either or both of 36 O.S. § 1219, & 23 O.S. § 103.

THEREFORE, it is **DECLARED, ORDERED, ADJUDGED, AND DECREED:**

7) That ROBERT LEE GAROT and JANELL RUTH VAN Y were continuously, and uninterruptedly Husband and Wife from and after September 15, 1983, until the death of ROBERT LEE GAROT, on November 22, 1990.

8) That the Plaintiff is the Widow of ROBERT LEE GAROT.

9) That there are no other successors, relations, relatives or issue, whether living or dead, of ROBERT LEE GAROT.

10) That the Court will entertain the issues of attorney's fees and costs upon application of the Plaintiff.

Memorialized this 29 day of June, 1992.

GAIL W. HARRIS

The Hon. GAIL HARRIS
JUDGE OF THE DISTRICT COURT

JAMES R. PRATT - OBA #7279
Attorney for Plaintiff
P.O. Box 690534
Tulsa, Oklahoma 74169-0534
(918) 583-9292

[illegible] Austin, Court Clerk, for Tulsa
[illegible]unty, Oklahoma, hereby certify that the
[illegible]regoing is a true, correct and full copy o
[illegible]he instrument hereinth set out as appears o
record in the Court Clerk's Office of Tulsa
County, Oklahoma, this

JUN 30 1992

By _____
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD COFFMAN, an individual,

Plaintiff,

vs.

OKLAHOMA DEPARTMENT OF CORRECTIONS, RON CHAMPION, in his representative capacity and as an individual, OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, R. G. WALDON, In his representative capacity and as an individual, OSAGE COUNTY SHERIFFS DEPARTMENT,

Defendants.

No. 92-C-283 E

ORDER OF DISMISSAL

NOW, on this, the 3 day of August, 1992, Plaintiff's application for dismissal with prejudice having been considered and the Court having found good cause for Plaintiff's dismissal with prejudice to refiling. The Court has further been advised that counsel for Defendant has no objections hereto.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause be dismissed with prejudice to refiling.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN W. SHERROD,

Plaintiff,

v.

JIM EARP,

Defendant.

92-C-120-B

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed June 30, 1992 in which the Magistrate Judge recommended that the Motion to Dismiss be granted.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 3rd day of August, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE AUG 4 1992

FILED

AUG 0 4 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARTIN D. GROSS; DENISE M. GROSS a/k/a DENISE MARGARET GROSS; BENEFICIAL FINANCE COMPANY; STATE OF OKLAHOMA ex rel. DEPARTMENT OF HUMAN SERVICES; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 91-C-970-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4th day of August, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendant, State of Oklahoma ex rel. Department of Human Services, appears by M. Karen Dale, Esq.; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Martin D. Gross, Denise M. Gross a/k/a Denise Margaret Gross, and Beneficial Finance Company, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Denise M. Gross a/k/a Denise Margaret Gross, acknowledged receipt of Summons and Complaint on January 1, 1992; that Defendant, Beneficial Finance

Company, acknowledged receipt of Summons and Complaint on December 23, 1991; that Defendant, State of Oklahoma ex rel. Department of Human Services, acknowledged receipt of Summons and Complaint on January 6, 1992; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on December 26, 1991; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on December 26, 1991.

The Court further finds that the Defendant, Martin D. Gross, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning May 14, 1992 and continuing to June 18, 1992, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Martin D. Gross, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Martin D. Gross. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the

evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Farmers Home Administration, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on January 15, 1992; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on January 15, 1992; that the Defendant, State of Oklahoma ex rel. Department of Human Services, filed its Answer on July 20, 1992; and that the Defendants, Martin D. Gross, Denise M. Gross a/k/a Denise Margaret Gross, and Beneficial Finance Company, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 16, 1990, Denise Margaret Gross filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-01332-W, and was discharged on September 11, 1990.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Twenty (20), Block Four (4), APPALOOSA ACRES SECOND, an Addition to the Town of Glenpool, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on February 1, 1978, the Defendants, Martin D. Gross and Denise M. Gross, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $26,000.00, payable in monthly installments, with interest thereon at the rate of 8 percent (8%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Martin D. Gross and Denise M. Gross, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated February 1, 1978, covering the above-described property. Said mortgage was recorded on February 1, 1978, in Book 4308, Page 742, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Martin D. Gross and Denise M. Gross a/k/a Denise Margaret Gross, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof

the Defendants, Martin D. Gross and Denise M. Gross a/k/a Denise Margaret Gross, are indebted to the Plaintiff in the principal sum of $28,098.31, plus accrued interest in the amount of $6,647.77 as of May 16, 1991, plus interest accruing thereafter at the rate of 8 percent per annum or $6.1586 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $298.70 for the publication fee.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $575.00, plus penalties and interest, for the year of 1991. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Martin D. Gross, Denise M. Gross a/k/a Denise Margaret Gross, and Beneficial Finance Company, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Department of Human Services, has a lien on the property which is the subject matter of this action by virtue of a Judgment, dated November 1, 1988 and recorded in the records of Tulsa County, Oklahoma in Book 5139 at Page 574 in the amount of

$1,300.00. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Martin D. Gross and Denise M. Gross a/k/a Denise Margaret Gross, in the principal sum of $28,098.31, plus accrued interest in the amount of $6,647.77 as of May 16, 1991, plus interest accruing thereafter at the rate of 8 percent per annum or $6.1586 per day until judgment, plus interest thereafter at the current legal rate of 3.51 percent per annum until paid, plus the costs of this action in the amount of $298.70 for the publication fee, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $575.00, plus penalties and interest, for ad valorem taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Martin D. Gross, Denise M. Gross a/k/a Denise Margaret Gross, Beneficial Finance Company and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Department of Human Services, have and recover judgment in the amount of $1,300.00.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Martin D. Gross and Denise M. Gross a/k/a Denise Margaret Gross, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $575.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, State of Oklahoma ex rel. Department of Human Services, in the amount of $1,300.00.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

M. KAREN DALE, OBA #13641
Attorney for State of Oklahoma ex rel.
Department of Human Services

Judgment of Foreclosure
Civil Action No. 91-C-970-E

KBA/esr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID ASHBAUGH and SHERRY ASHBAUGH, Husband and Wife, and DAVID ASHBAUGH, as Parent and Next Friend of JENNIFER ASHBAUGH, DANIEL ASHBAUGH, and BRENDA ASHBAUGH, Minors,

Plaintiffs, Counter-Defendants,

v.

DAVID A. GOODMAN,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant, Counter-Plaintiff.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Third-Party Plaintiff, Counter-Defendant,

v.

HEALTH COST CONTROLS,

Third-Party Defendant, Counter-Plaintiff.

HEALTH COSTS CONTROLS,

Cross-Plaintiff,

v.

DAVID ASHBAUGH and SHERRY ASHBAUGH, Husband and Wife, and DAVID ASHBAUGH, as Parent and Next Friend of JENNIFER ASHBAUGH, DANIEL ASHBAUGH, BRENDA ASHBAUGH, Minors, and DAVID A. GOODMAN,

Cross-Defendants.

No. 92-C-565-E

ORDER DIRECTING PAYMENT OF JUDGMENT AMOUNT INTO COURT AND ORDER OF DISMISSAL AS TO DAVID A. GOODMAN AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Now on this 3rd day of August, 1992, comes on to be heard the Application to Pay Judgment Proceeds Into Court and Motion to Dismiss of Defendants, State Farm Mutual Automobile Insurance Company and David A. Goodman. After considering said Application/Motion and Brief in support thereof, it is the Order of this Court that said Application/Motion is hereby granted. State Farm and David A. Goodman are hereby ordered to pay into this Court, within twenty days of the date of this Order, the sum of TWENTY THOUSAND DOLLARS ($20,000.00), which represents full satisfaction of the judgment entered in this action on April 24, 1992. Upon payment of said amount into this Court, State Farm and David A. Goodman are hereby dismissed from this action with prejudice, and said judgment is fully released and satisfied of record.

IT IS SO ORDERED this 3rd day of August, 1992.

JUDGE OF THE DISTRICT COURT

194-347/GLB/mm

copy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 31 1992
Richard M. [illegible] Clerk
U.S. DISTRICT COURT

ATLANTIC RICHFIELD COMPANY, Plaintiff, v. AMERICAN AIRLINES, INC., Et. Al., Defendants.	Consolidated Cases Nos. 89-C-868-B 89-C-869-B 90-C-859-B

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Now on this 30 day of August, 1992, all parties hereto please take notice that pursuant to Rule 41 (a) of the Federal Rules of Civil Procedure and Section V. of the Case Management Order the Plaintiff hereby dismisses without prejudice this action against the following Defendants only, and expressly reserves its causes of action against all other Defendants, not heretofore dismissed from this action:

1. Bill Hall, Jr.
2. City of Ada
3. Clair C. Wilson
4. John A. Helton
5. John Ballentine
6. John Scoggins
7. St. Clair Lime Company

Gary A. Eaton, OBA #2598
Attorney at Law
1717 East 15th St.
Tulsa, OK 74104
918 743 8781

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CERTIFICATE OF MAILING

The undersigned certifies that on August 3, 1992, a true and correct copy of the above instrument / pleading was mailed with postage prepaid to the following persons:

Mr. Larry Gutterridge, Co-Counsel for Plaintiff, 633 West 5th Street, 35th Floor, Los Angeles, California 90071

Mr. William Anderson, Attorney at Law and Liaison Counsel and Co-Lead Counsel for Owners and Non-Operator Lessees Group, 320 South Boston Building, Suite 500, Tulsa, OK 74103

Mr. John Tucker, Lead Counsel for Non Group Generators and Transporters, 2800 Fourth National Bank Building, Tulsa, OK 74119

Mr. Steven Harris, Attorney at Law and Lead Counsel for Operators Group, Suite 260 Southern Hills Tower, 2431 East 61st Street, Tulsa, OK 74136

Mr. Charles Shipley, Attorney at Law and Settlement Coordinator, 3600 First National Tower, Tulsa, OK 74103

Ms. Claire V. Eagan, Mr. Michael Graves, and Mr. Matthew Livengood, Attorneys at Law and Lead Counsel for the Sand Springs PRP Group, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, OK 74172

Name

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PREMISES KNOWN AS:
1638 EAST SECOND STREET,
TULSA, TULSA COUNTY,
OKLAHOMA, SINGLE FAMILY
RESIDENCE, THE FRONT DOOR
OF THE RESIDENCE FACES EAST,

Defendant.

No. 92-C-232-B

O R D E R

This case was remanded from the Tenth Circuit Court of Appeals for "the limited purpose of disposing of the pending motion to reconsider." The Court assumes the referenced pending motion is the request for modification of the Order of March 23, 1992 in plaintiff's Ex Parte Memorandum of April 6, 1992. In its memorandum plaintiff informed the Court that an investigation of John Lawmaster was no longer in progress and requested that the Court delete the reference to an "ongoing investigation" on page 2 of the Order, "if the Court feels it necessary to modify its Order."

As reflected in the Order of March 23, 1992, the Court based its denial of the appeal of the Magistrate Judge's Order sealing the record relating to a search warrant executed at 1638 E. 2nd Street, Tulsa, Oklahoma, 74120 on two grounds: the ongoing investigation of John Lawmaster and the possibility of reprisal directed toward the affiant. Plaintiff's correction of the record concerning the "ongoing investigation" did not alter the Court's

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decision as the possibility of reprisal remained. The Court, therefore, did not modify its Order.

In order to clarify the Court's decision in the Order of March 23, 1992, the Court modifies the first paragraph of the Order to read as follows:

> Following a review of the record, the Court concludes the applicant's request should be denied because the unsealing of the affidavit in support of the search warrant might make the person or persons involved in the investigation vulnerable to reprisal. Therefore, the Court DENIES applicant's request for unsealing said documents.

IT IS SO ORDERED, this 31ST day of July, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GERALD LEE CARROLL, Petitioner,	)	
v.	)	91-C-923-B
STANLEY GLANZ, Respondent.	)	

ORDER

Petitioner Gerald Lee Carroll, who was sentenced to a 180-month prison term for crimes surrounding a bank robbery, has filed a 28 U.S.C. §2255 motion for relief with this Court. But in a July 15, 1992 response, the Government contends that Carroll's §2255 motion is untimely because he has a direct appeal pending in the Tenth Circuit.

Carroll filed this motion on December 4, 1991. On January 21, 1992, he filed a notice of appeal with the Tenth Circuit. He filed his principal brief on appeal on June 29, 1992. *See Government's Response To Petitioner's Motion For Relief Under 28 U.S.C. §2255, page 1 (docket #10).* That appeal is still pending.

A defendant in a federal criminal prosecution is not entitled to have a direct appeal and a section 2255 proceeding considered simultaneously in an effort to overturn the conviction and sentence except "under [the] most unusual circumstances." *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988).[1] The reason for this rule is that

[1] *Also, see the authority cited by the Government in its brief: United States v. Daily, 921 F.2d, 994, 998 n.2 (10th Cir. 1990) and Fassler v. United States, 858 F.2d 1016, 1019 (5th Cir. 1988).*

disposition of the appeal may render the [§ 2255] motion unnecessary. *Feldman v. Henman*, 815 F.2d 1318, 1320 (9th Cir. 1987).

In this case, nothing in the record suggests any unusual circumstances. Therefore, Carroll's §2255 motion will be dismissed without prejudice. When the Tenth Circuit has disposed of the direct appeal, Carroll may re-file his petition.

SO ORDERED THIS 31 day of July, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MCI TELECOMMUNICATIONS CORPORATION,

Plaintiff,

v.

FALCON METAL STRUCTURE COMPANY,

Defendant.

Civil Action No. 92-C-086 E

FINAL JUDGMENT BY DEFAULT

THIS CAUSE coming on upon MCI TELECOMMUNICATIONS CORPORATION'S Motion for Entry of Judgment by Default, and it appearing that a default has been duly entered against the Defendant, it is

ORDERED AND ADJUDGED that MCI Telecommunications Corporation shall recover from Defendant, Falcon Metal Structure Company, the principal sum of $17,654.32 plus reasonable attorneys' fees of $387.00 and court costs of $155.00 for a total amount of $18,196.32, plus post judgment interest at the rate of 4.41% per annum, accruing from the date of this judgment, for which sum let execution issue.

DATED this 29 day of July, 1992.

S/ JAMES O. ELLISON

United States District Judge

TEN-1732